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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 90

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1946

CERTIORARI GRANTED MAY 6, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 60

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 In the United States Circuit Court of Appeals for the First Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY, RESPONDENT

Petition for enforcement of an order of the National Labor Relations Board

Filed in Circuit Court of Appeals June 15, 1945

To the Honorable, the Judges of the United States Circuit Court of Appeals for the First Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of A. J. Tower Company and Local #24, Waterproof Garment Workers Union, Affiliated with International Ladies' Garment Workers Union (A. F. of L.), Case No. 1–C–2416."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Massachusetts corporation, engaged in business in the State of Massachusetts, within this judicial circuit, where the unfair labor practices were committed. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on March 23, 1945, duly stated its
2 findings of fact, conclusions of law, and order directed to respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local #24, Water-

proof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) Post at its plant at Roxbury, Massachusetts, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the First Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

3 (c) Notify the Regional Director for the First Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On March 23, 1945, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court the

transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript, and upon the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
By /S/ Malcolm F. Halliday,
MALCOLM F. HALLIDAY,
Associate General Counsel.

Dated at Washington, D. C., this 13th day of June 1945.

4 *Appendix A*

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not refuse to bargain with local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of our employees in the bargaining unit described herein;

We will not engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this Union, or any other labor organization.

We will bargain collectively, upon request, with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all employees at our Rox-

bury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees.

(Employer) (Title)

By _____

(Representative) (Title)

Dated_____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[*Duly sworn to by Malcolm F. Halliday; jurat omitted in printing.*]

In the United States Circuit Court of Appeals for the First Circuit

[Title omitted.]

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in the proceeding had before said Board entitled "In the Matter of A. J. Tower and Company and Local #24, Waterproof Garment Workers Union, Affiliated with International Ladies' Garment Workers Union (A. F. of L.)," the same being known as Case No. 1–C–2416 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating Earl S. Bellman Trial Examiner for the National Labor Relations Board, dated August 3, 1944.

(2) Stenographic transcript of testimony held before Trial Examiner Bellman on August 3, 1944, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Bellman's Intermediate Report, dated September 20, 1944 (annexed to Item 13 hereof).

(4) Copy of order transferring case to the National Labor Relations Board, dated September 30, 1944.

(5) Copy of respondent's request to present oral argument before the Board, dated October 9, 1944.

(6) Copy of respondent's telegram, dated October 13, 1944, requesting extension of time for filing brief and exceptions.

(7) Copy of telegram, dated October 13, 1944, granting all parties extension of time for filing briefs and exceptions.

(8) Copy of respondent's exceptions to the Intermediate Report.

(9) Copy of notice of hearing for the purpose of oral argument before the Board, dated January 12, 1945.

(10) Copy of Union's telegram, dated January 18, 1945, requesting postponement of oral argument.

(11) Copy of notice of postponement of oral argument, dated January 22, 1945.

(12) Copy of list of appearances at oral argument held before the Board on February 8, 1945.

(13) Copy of Decision and Order issued by the National Labor Relations Board, dated March 23, 1945, with annexed Intermediate Report, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof, the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board, in the City of Washington, District of Columbia, this 24th day of May 1945.

[SEAL]

John E. Lawyer,
JOHN E. LAWYER,
Chief, Order Section,
National Labor Relations Board.

14 Before the National Labor Relations Board

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

Respondent's statement of exceptions to intermediate report

And now comes the A. J. Tower Company, Respondent in the above-entitled proceedings, and hereby excepts to the Intermediate Report, dated September 29, 1944, as follows:

1. The Respondent excepts to the finding on page 8, lines 12 and 13, that Kane "returned to the plant to see if there was lighter work available for her," for the reason that there is no evidence that Kane ever returned to the plant other than to secure a release. (See page 70 of the Official Report of the Proceedings.)

2. The Respondent excepts to the finding on page 8, lines 17–23 inclusive, that

"Thus while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was then ill, it is equally apparent, on the one hand, that the Regional Director's less positive finding as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944."

for the reason that the finding is unsupported by the evidence; that the evidence set forth by the Trial Examiner, page 8, lines 6 to 10 inclusive, in substantiation of this finding, is not material to a determination of whether Kane was or was not an employee; and that the Trial Examiner does not fairly state all the pertinent facts relating to whether Kane was or was not an employee in that he fails to set forth the evidence indicating that Kane was not an employee of the Respondent at the time of the election on May 5, 1944, including the following facts:

(a) Kane has not worked for the Company since March 24, 1944. (See page 74 of the Official Report of the Proceedings.)

(b) Prior to May 5, 1944, Kane had her name placed upon the lists of the United States Employment Service as available for work. (See pages 57 and 58 of the Official Report of the Proceedings.)

(c) Prior to May 5, 1944, Kane applied for unemployment benefits, indicating, in substantiation of that application, that she had left the employ of the Company in March, 1944, because she couldn't continue to do heavy work of carrying bundles, which was part of her job. (See Respondent's Exhibit No. 1.)

(d) On May 8, 1944, Kane signed a statement in which she said she had left the employ of the Company in March, 1944. (See Respondent's Exhibit No. 2.)

(e) Sometime during the early part of July 1944, Kane requested a release from the Company. (See page 70 of the Official Report of the Proceedings.)

(f) Under date of March 31, 1944, Dr. S. E. Theodore, Mrs. Kane's own physician, signed a written statement to the effect that Mrs. Kane could not engage in any gainful occupation. (See page 125 of the Official Report of the Proceedings.)

3. The Respondent excepts to the finding on page 9, lines 48 to 51 inclusive, that

"The Regional Director's opinion that the respondent failed to correct the voting list or to challenge Kane's eligibility at the polls

'through oversight' is a temperate conclusion in view of all of the evidence in this case."

for the reason that the statement implies that the failure to correct the voting list or to challenge Kane's eligibility at the polls could have been the result of something besides oversight when there is no evidence whatsoever of any other reason or cause so that the implication is uncalled for, unjust, unfair and without a scintilla of evidence to support it. The statement of the Trial Examiner, page 9, lines 46 to 48 inclusive, that he finds it difficult to credit Mr. Elbery's testimony that it was impossible for him to identify his informant, is immaterial to the issue in this case, besides being unjustified and without any support in the evidence, and specifically has no bearing on why the voting list was not corrected or why Kane's eligibility was not challenged at the polls since the information as to Kane not being an employee of the Respondent was communicated to Mr. Elbery on the third day after the polls had closed.

4. The Respondent excepts to the finding on page 10, lines 1 to 5 inclusive, that

"Upon the entire record, the undersigned concludes and finds that the Regional Director's certification of the Union upon the basis of the election of May 5, 1944, was neither arbitrary nor capricious and that, accordingly, it is binding upon the parties to the Agreement for Consent Election."

for the reason that the statement is a conclusion of law and not a finding of fact and for the additional reason that it is unsupported by the evidence and is contrary to the applicable law.

17 5. The Respondent excepts to the finding on page 10, lines 25 to 33 inclusive, that

"The undersigned also finds that at all times since May 5, 1944, the Union has been the bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union has been at all times since May 5, 1944, and now is, the exclusive representative of all of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

for the reason that the statement is a conclusion of law and not a finding of fact and for the additional reason that it is unsupported by the evidence and is contrary to the applicable law.

6. The Respondent excepts to the finding on page 10, lines 40 to 42 inclusive, that the Respondent "has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," for the reason that the state-

ment is a conclusion of law and not a finding of fact and for the additional reason that it is unsupported by the evidence and is contrary to the applicable law.

7. The Respondent excepts to the finding on page 11, lines 7 and 8, that the activities of the Respondent which are involved in the present case "tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce," for the reason that it is unsupported by the evidence.

8. The Respondent excepts to the conclusions of law on page 11, lines 36 to 58 inclusive, that

"3. Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), was on May 5, 1944, and at all times thereafter has been, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 9, 1944, and at all times thereafter, to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act."

for the reason that such conclusions are contrary to the applicable law.

9. The Respondent excepts to the recommendations on page 11, lines 60 to 65, inclusive, and continued on page 12, lines 1 to 47, inclusive, that the Respondent shall

"1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the

right to self-organization, to form labor organizations, to join or assist Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union, (A. F. of L), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Post immediately in conspicuous places at its plant in Roxbury, Massachusetts, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the First Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that, unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid."

for the reason that such recommendations are unsupported by the evidence and are contrary to the applicable law.

10. The Respondent excepts to the failure of the Trial Examiner to find pertinent facts which would state the true situation including a finding that Mrs. Kane was not an employee of the A. J. Tower Company on May 5, 1944.

11. The Respondent excepts to the failure of the Trial Examiner to conclude as a matter of law that Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), was not on May 5, 1944, or at any time thereafter, the exclusive representative of any employees of the A. J. Tower Company for the purpose of collective

bargaining within the meaning of Section 9 (a) of the National Labor Relations Act.

12. The Respondent excepts to the failure of the Trial Examiner to conclude as a matter of law that the Respondent has not engaged in and is not engaging in any unfair labor practice within the meaning of Section 8, subsection 1 of the National Labor Relations Act.

13. The Respondent excepts to the failure of the Trial Examiner to conclude as a matter of law that the Respondent has not engaged in and is not engaging in any unfair labor practice within the meaning of Section 8, subsection 5 of the National Labor Relations Act.

14. The Respondent excepts to the Intermediate Report on the whole on the ground that the Trial Examiner's findings of fact, his conclusions of law and his recommendations are unsupported by the evidence, are contrary to the applicable law and are erroneous.

15. The Respondent excepts to the failure of the Trial Examiner to recommend that the entire complaint be dismissed.

Wherefore, the Respondent prays that the entire complaint be dismissed.

Respectfully submitted.

ROBERT G. MOCH,
Counsel for A. J. Tower Company.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

Decision and order

March 23, 1945

On September 29, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report, and the respondent and the Union filed briefs. Oral argument, in which the respondent and the Union participated, was held before the Board at Washington, D. C., on February 8, 1945. The Board

has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions, the briefs of the respondent and the Union, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions:

1. The Trial Examiner found, and we agree, that the respondent refused to bargain with the Union in violation of Section 8 (1) and (5) of the Act. The respondent defends its position on the alleged ground that the Union had not been validly chosen as the statutory bargaining representative in a prior election conducted by the Regional Director pursuant to a consent election agreement because Kane, one of the voters, was not an employee. The Regional Director ruled, on the basis of the facts set out in his report, that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced. As we have previously held,[1] we will not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious. No such grounds for disturbing the instant ruling of the Regional Director are present in this case.

2. The respondent contends that its objection to the election on the ground that Kane was not eligible to vote, was filed within 5 days after the issuance of the Tally of Ballots, as provided
26 in the consent election agreement, and hence was timely. The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's Rules and Regulations.[2] The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot. Here, the respondent's representatives certified that the election was properly conducted; its objection merely consisted of a challenge to the ballot of Kane on the ground that she was ineligible to vote. Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon.

3. The respondent further contends that the right to challenge

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[1] N. L. R. B. v. Capital Greyhound Lines, 45 N. L. R. B. 136, enf'd 140 F. (2d) 734 (C. C. A. 6), cert. den. 323 U. S. 763; Matter of Aetna Pipeline Company, 57 N. L. R. B. 949.

[2] Article III, Section 10, National Labor Relations Board Rules and Regulations—Series 3, as amended.

a voter on the ground that he is a nonemployee cannot be waived as a matter of law. The respondent reasons that since it would not be valid for the respondent in advance to agree with the Regional Director to permit nonemployees to vote, the respondent cannot do so by waiver. Here again we believe that the respondent has misconceived the issue. Were the Regional Director knowingly to agree in advance to permit nonemployees to vote, we might well hold his action to be arbitrary and capricious, but that is not the issue in this case. Here we are confronted solely with the question of whether the respondent, after certifying Kane as an eligible employee voter and permitting her to vote without challenge although facts which it now asserts rendered her ineligible were then in its possession, should be permitted to attack her status as a voter after the results of the election have been announced. The Regional Director's ruling that under the circumstances the respondent's claim could not be considered at that stage, is not arbitrary or capricious as a matter of law, but, as stated in the Intermediate Report, is in complete accord with the established principles and policy of the Board.[3]

We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a postelection challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been cast against the Union,[4] it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have
27 been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

4. Finally, the respondent contends that the consent election agreement is invalid because it does not conform with the Mas-

[3] The respondent seeks to distinguish the cases cited in the Intermediate Report, contending that in those cases the post-election challenge attacked the eligibility of the voter on the ground that he did not fall within the appropriate unit while in the instant case the eligibility of the voter is attacked on the ground that she was not an employee. We perceive no distinction in principle between the two grounds of attack which would render the former defense invalid and the latter valid. Section 9 (a) of the Act of refers to a bargaining representative selected by a majority of the employees in an appropriate unit.

[4] We do not regard Kane's signed statement, submitted by the respondent to the Regional Director, as evidence that Kane voted for the Union. Because of a reluctance to antagonize the employer or the Union, a voter, knowing that his statement could not be verified, would not be likely to disclose the true state of his ballot. But what is even more important, we cannot sanction the respondent's invasion of the voter's privacy because such a practice would nullify the very purpose of the secret ballot to insure a free and untrammeled choice. Indeed, we would regard as an unfair labor practice an employer's questioning of his employees as to the manner in which they voted in a Board election. To the extent that any statement in the decision in Matter of Capitol Greyhound, 49 N. L. R. B. 156 is inconsistent herewith, such statement is overruled.

sachusetts law pertaining to arbitration agreements. It is sufficient to say that the Board, in enforcing a national policy, is not bound by local statutory conceptions.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post at its plant at Roxbury, Massachusetts, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the First Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to

employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

28 (c) Notify the Regional Director for the First Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 23rd day of March 1945.

[SEAL]

HARRY A. MILLIS,
Chairman,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

29 GERARD D. REILLY, concurring specially:

I concur with the majority in the view that the consent election of May 5, 1944, determined that the Union represented a majority of the employees in the bargaining unit involved in this case. Since their conclusion is based in part, however, upon a theory which I think is questionable, I feel that I should express my views separately.

The issue which the respondent seeks to raise here involves the validity of the certification issued by the Regional Director following the consent election. The respondent contends that the record shows that a majority of the employees in the unit did not vote for the Union; that the certification was invalid; and that, therefore, it has no duty under the Act to bargain with the Union as exclusive bargaining representative of the employees involved. This contention is predicated primarily upon the respondent's argument that Kane was not an employee when she cast her ballot. My colleagues hold, in effect, that, since the respondent failed to challenge Kane's ballot at the election, it is estopped from raising that argument by means of an objection to the election and in this proceeding. I am of the opinion that this reasoning is erroneous as a matter of law. Although I have consistently held that binding commitments may estop parties from utilizing the processes of this Board,[8] I do not believe that any doctrine of estoppel is applicable here. The Board's jurisdiction under the Act to prevent an employer from engaging in unfair labor practices in violation of Section 8 (5) is restricted to instances where there is a refusal to bargain with a representative of a majority of employees in an appropriate unit. A determination that a labor organization is the majority representative contemplated by the Act, where its designation as such depends upon ballots cast by

[8] See dissenting opinions in Matter of Packard Motor Company, 47 N. L. R. B. 933; and Matter of Federal Motor Truck Company, 49 N. L. R. B. 87.

individuals who were not employees when said ballots were cast,[1] is clearly not within the Board's power. Therefore, *a fortiori*, no theory of "waiver" or "estoppel" will supply the Board with such jurisdiction.

However, I am of the opinion that the weight of the evidence in the case establishes that Kane was an employee at the time of the election and, therefore, the Union was properly selected by a majority of the employees. The fact that Kane's name was included on the pay-roll list which the respondent itself drew up and vouched for as a list of eligible employee voters, *prima facie* establishes that Kane had the status of an employee. Kane's statement in her application for unemployment insurance benefits is entitled to no more weight than, and is in effect neutralized by, her statement to an agent of the Board that she did not intend thereby to sever her employment relationship with the respondent. Nor may such statements be regarded as an admission against interest since Kane was not an interested party in this proceeding. Kane did not in fact accept any other employment. On this state of the record, I am of the opinion that the respondent has not successfully overcome the *prima facie* case establishing Kane's employee status at the time of the election.

Signed at Washington, D. C., this 23rd day of March 1945.

GERARD D. REILLY,
Member,
National Labor Relations Board.

30 *Appendix A*

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not refuse to bargain with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of our employees in the bargaining unit described herein;

We will not engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing,

[1] Ct. N. L. R. B. v. Capital Greyhound Lines, 49 N. L. R. B. 156, enf'd 140 F. (2d) 754 (C. C. A. 6), cert. den., 322 U. S. 762.

and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this Union, or any other labor organization.

We will bargain collectively, upon request, with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all employees at our Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees.

A. J. TOWER COMPANY.

(Employer)

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

31. BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRIAL EXAMINING DIVISION; WASHINGTON, D. C.

Case No. 1-C-2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

Messrs. Leo J. Halloran and Samuel G. Zack, for the Board.

Herrick, Smith, Donald, Farley & Ketchum, by Mr. Robert G. Moch, of Boston, Mass., for the respondent.

Mr. George E. Roewer, of Boston, Mass., for the Union.

Intermediate report

Sept. 29, 1944

Statement of the case

Upon a charge duly filed on June 9, 1944, by Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), herein called the

Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the First Region (Boston, Massachusetts), issued its complaint, dated July 24, 1944, against A. J. Tower Company, Roxbury, Massachusetts, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notices of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint, as amended at the hearing, alleged in substance: (1) that all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining; (2) that on or about May 5, 1944, the Union was designated by the employees in the aforesaid unit as their representative and has at all times since been such representative for the purposes of collective bargaining; (3) that on or about May 25, 1944, and continuously thereafter the Union requested the respondent to bargain collectively; (4) that on or about June 6, 1944, and continuously thereafter the respondent refused to bargain collectively with the Union; and (5) that by such refusal the respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

32 On August 2, 1944, the respondent filed its answer which, as amended at the hearing, admitted the appropriateness of the unit, and that the Union had requested and the respondent had refused to bargain collectively. The answer denied, in substance, that the Union is or ever has been the duly designated bargaining agent of the employees in the appropriate unit because the result of a consent election held on May 5, 1944, would be a tie vote if a ballot challenged by the Union were opened, upon overruling the challenge, and proved to be against the Union, and if a ballot cast for the Union by Jennie A. Kane, who was not an employee of the respondent at the time of the election and has not since been such an employee, were subtracted from the vote received by the Union.[1]

[1] In the consent election, 116 votes were cast for the Union and 114 against the Union. There was also 1 ballot challenged by the Union. Under the respondent's contention, Kane's vote for the Union would be subtracted from the votes received by the Union and the challenged ballot, if against the Union, would be added to the votes against the Union, thus producing a tie vote of 115 for and 115 against the Union.

Pursuant to notice, a hearing was held on August 3, 1944, at Boston, Massachusetts, before Earl S. Bellman, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the hearing, without objection, the pleadings were conformed to the proof as to formal matters. The parties were afforded the opportunity to argue orally before the undersigned and were given leave to file briefs with the undersigned. Briefs have been received from the respondent, the Union, and the Board. Also a letter from the respondent has been considered as a supplement to its brief.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of fact

I. THE BUSINESS OF THE RESPONDENT

A. J. Tower Company, a Massachusetts corporation, is engaged at its principal office and plant in Roxbury, Massachusetts, in the manufacture and sale of waterproof oiled clothing, aprons, hats, and fabrics.[2] During the calendar year of 1943, the value of the respondent's raw materials, consisting of cotton textiles, oils, threads, fastenings, and sundries, was in excess of $1,000,000. Approximately 90 percent of such raw materials was shipped to the respondent's plant from points outside of the Commonwealth of Massachusetts. During 1943, the value of the respondent's finished product was in excess of $2,500,000,[3] of which 95 percent was transported to points outside of the Commonwealth of Massachusetts. For the purpose of this proceeding, the respondent concedes that it is engaged in interstate commerce and is subject to the provisions of the Act.

II. THE ORGANIZATION INVOLVED

Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), is a labor organization which admits to membership certain employees of the respondent.

[2] The respondent has one wholly owned subsidiary, A. J. Tower Sales Company.
[3] The value of the above products which went to various departments of the United States Government was $2,250,342.08.

33 III. THE UNFAIR LABOR PRACTICES

A. Chronology of events

On April 24, 1944, the Union filed its Petition for Certification of Representatives in Case No. 1–R–1880, pertaining to certain employees in the respondent's Roxbury plant, with the Board at its office for the First Region at Boston, Massachusetts. Thereafter on April 27, 1944, an Agreement for Consent Election was duly signed by the respondent and the Union and approved by the Board's Regional Director. Said agreement provided, among other things, for an election on Friday, May 5, 1944, among the employees of the respondent alleged in the complaint in this case and admitted in the answer to constitute an appropriate unit; that the pay-roll period for eligibility would be April 21, 1944; that employees in the unit "who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off" should be eligible voters; that employees "who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election" were not eligible to vote; and that objections "to the conduct of the ballot, or to a determination of representatives based on the results thereof," might be filed with the Regional Director within five days after the issuance of the Tally of Ballots. The agreement also contained the following provision:

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

On May 1, 1944, the respondent, in conformity with the Consent Election Agreement, furnished the Regional Director with a complete list of its employees in the appropriate unit on its pay roll for April 21, 1944.[4] The pay-roll so furnished was the only pay-roll used at the election. Jennie A. Kane, a stitcher whose classification admittedly falls within the appropriate unit, was marked upon the pay-roll setting out the eligible voters as "out sick." Kane, who last worked at the respondent's plant on March 24, 1944, had sent her forelady a note on March 31, 1944, stating that she had not been to work the preceding week because she had been sick and asking that her pay be given to the bearer of the note.

[4] The evidence shows that the employees, on the pay roll of April 21, performed the work for which they were then paid during the period from April 7 to April 14, as it is the respondent's practice to pay its employees one week after the termination of the work period for which payment is made.

Kane cast an unchallenged ballot[5] at the election duly held on May 5, 1944, under the supervision of an agent of the Regional Director as provided in the agreement. At the election the respondent was duly represented by two observers who had been informed of their rights and duties with respect to such matters as the challenging of the ballot of any person not qualified to vote. One of the respondent's observers, a clerk in the factory office, regularly received records in the course of her duties by which she would have known whether any given employee, such as Kane, had actually worked during any given week.

After the polls had closed on May 5, the two authorized observers of the respondent, the two authorized observers of the
34 Union, and the agent of the Regional Director duly signed the customary Certification on Conduct of Election which set out that the "balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote." Under the date of May 5, 1944, there was issued, over the signatures of representatives of the Regional Director, the respondent, and the Union, the Tally of Ballots which set out that there were approximately 250 eligible voters; that 230 valid votes were cast, of which 116 were cast for the Union and 114 against the Union; and that in addition there was 1 challenged ballot.

The respondent filed objections to the election on May 9, 1944, clearly within the 5-day period provided in the agreement for filing such objections. In its objections the respondent stated that it had come to its attention after the election that Kane was not an employee;[6] challenged "the right of Mrs. Kane to vote in the election of employees at its plant" and "the ballot cast by her"; pointed out that the ballot challenged by the Union in the election, won by only 2 votes, had not been passed on; requested a hearing for the purpose of passing on this challenged ballot;[7] and argued that if the challenge to said ballot were overruled and the ballot should prove to be against the Union it would then "become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane."[7] The objections also set forth as facts with respect to Kane, the following:

Mrs. Kane was employed by A. J. Tower Company from March

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[5] In Board election practice, challenged ballots are distinguishable but unchallenged ones are not. Since Kane's ballot was not challenged it was counted and was in no way differentiated from the rest of the unchallenged ballots.

[6] It should be noted that the agreement provided that employees who had "since quit" and had not been "rehired" were not eligible to vote.

[7] It was then and is now clearly impossible to determine which one of the 230 ballots which had been counted as valid had been cast by Kane. It should also be noted that the respondent chose as its starting point in exploring the possibility that the election might be found to be a tie, a hearing upon the ballot challenged by the Union at the election on May 5, rather than any ruling upon its post-election challenge concerning Kane.

16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March 1944, and that her reason for leaving was that she "could not continue to do heavy work of carrying bundles which was part of her job." The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment.

A conference was held among representatives of the respondent, the Union, and the Board on May 12, 1944, for the purpose of considering the respondent's objections. A hearing thereafter was held on said objections on May 22, 1944, which was attended by representatives of the respondent, the Union and the Board. On May 24, 1944, the Regional Director issued and duly served copies of his "Report on Objections." This report was duly amended on May 31, 1944.*

The Regional Director's Report on Objections, summarizing the basis of the respondent's objections, sets out the above-quoted paragraph concerning Kane contained in the respondent's objections. The report then states:

The Company contends that irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane was ineligible beyond question.

The report continues with the following summary of the conflicting evidence considered by the Regional Director as to Kane's employment status and as to whether she had ever revealed how she had cast her ballot:

* * * It [Company] submitted a witnessed statement signed by her on May 8, 1944, stating that she "left the employ of A. J. Tower Co. in March 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last

* The discussion herein is based on the amended report.

Friday. I have not worked since leaving the Tower Co. because of my physical condition."

Susequently interviewed by an Agent of the Board on May 23, 1944, Mrs. Kane asserted—"On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. & in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company & therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

"On May 8, 1944, Mr. Ellberry of the Co. & another gentleman whose name I've forgotten visited me at my home & questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say 'I applied for social security benefits because of this' but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

"Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A. J. Tower Co., which Miss Higgins a fellow employee carried for me. In this note, I told Miss Stone that I was under a docter's care & that I intended to return to the Company as soon as I was well.

36 "Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able & asked him would I get my job back or would he give me a release. Mr. Ellberry said 'I don't see why you need a release.' This was in answer to my question, 'Would I need a release to obtain social security benefits?' When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Co."

The report then sets out evidence secured by subsequent investigation and the Regional Director's concluding findings and rulings, including footnote citations, in the following language:

Subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security of the Commonwealth of Massachusetts on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do heavy work of carrying bundles.

A Notice to Employer of Claim Filed was sent to the Company by the U. S. Employment Service on May 1, 1944, the same day on which the Company submitted "a complete list of employees of the A. J. Tower Co. on the payroll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944."

The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in the opinion of the undersigned it failed, through oversight, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls.

The Board Agent conducting the election reports that he followed the usual practice of instructing the observers at the election, including the two Company representatives, Helen Considine and Charles Kissork, who were accompanied by the Company counsel, of their right to challenge the ballot of any person believed ineligible to vote. These observers were present when Mrs. Kane cast her ballot and did not challenge her right to vote. Prior to the count of the ballots, the Company tellers conferred with the Company counsel when asked to certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote their ballots in secret. After approval by counsel, both signed the usual Certification on Conduct of Election.

The fact remains that the list of eligible voters was prepared solely by the Company and was submitted by them as the exclusive list of eligible voters. Four or five days prior to the election, the Company knew, by reason of a letter from the U. S. Employment Service, that Mrs. Kane had made an application for unemployment compensation. It is this application that the Company urges as a basis for determining that she was not an employee at the time of the election and therefore not entitled to vote; yet not only did it do nothing to correct the eligibility list, but it did in fact acquiesce in her casting a ballot. Whether or not Mrs. Kane
37 was an employee entitled to vote was, under the circumstances, a fact peculiarly within the Company's knowledge. Yet it was not until four days after the election that they raised any objection to her vote.[1]

Although the question of Mrs. Kane's status as an employee is

[1] See N. L. R. B. v. Capitol Greyhound Lines, et al., No. 9592 U. S. C. C. A.—Sixth; decided January 31, 1944.

not quite clear, the undersigned is of the opinion that under the circumstances set forth the Company has waived its right to challenge her vote or to object to the election on this ground.[2] To hold otherwise would vitiate the Board's procedure of having observers present at the polls, of challenges by such observers, and of certifications of conduct by the parties.

Since the overruling of this point makes unnecessary a ruling on the vote challenged at the election, the undersigned finds that a majority of the valid votes have been cast for the Union indicated below. Pursuant to Section 8 of the Agreement for Consent Election the undersigned hereby finds and determines that Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies' Garment Workers Union (A. F. of L.) is the exclusive representative of all the employees in the unit defined in Section 2 of the Agreement for Consent Election, for the purposes of bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

By letter dated May 25, 1944, the Union requested a collective bargaining conference as to the terms of an agreement covering the employees in the unit for which it had been certified.[3] By letter dated June 6, 1944, the respondent replied to the Union's letter of May 25, stating that in the light of "certain matters having to do with the election" with respect to which the Union was familiar, the respondent did not believe that the Union had been "validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held."

B. The respondent's contentions

The respondent raises no question as to the manner in which the election was conducted and makes no claim that the Regional Director acted arbitrarily or capriciously in the way he conducted his investigation of the objections or arrived at his decision thereon. However, the respondent contends, in essence, that "as a matter of law" the Regional Director's decision is arbitrary and capricious because it permits the vote of a non-employee to determine the result of an election among its employees and because there is no basis for the finding therein that through "negligence or laches" the respondent waived its right to challenge Kane's vote or to object to the election.

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[2] See In re American Granite Finishing Company and International Union of Operating Engineers (XXVIII NLRB 739).

[3] The amendment of May 31, 1944, did not modify the certification but pertained only to the third paragraph of the section of the Regional Director's report last quoted above.

38 As to the vote of a non-employee determining the election, it should be noted that the Regional Director made no finding as to how Kane voted or as to whether or not Kane was an employee of the respondent at the time of the election. The Report on Objections does not resolve the first point. On the second, it refers to Kane's employment status as "not quite clear." As to Kane's status, the evidence shows that Kane has been ill; that the respondent has never set a time limit as to how long an employee may be absent from work because of illness before being separated from the pay roll; that in some cases employees are away from work "a good many months" because of illness; that Kane's name was not taken off the respondent's pay roll until some time after May 8, 1944; and that it was not until the early part of July, when she returned to the plant to see if there was lighter work available for her, that Kane was first informed that her name was no longer on said pay roll. Further, there is no evidence that Kane has worked anywhere else since March when she sent her forelady at the respondent's plant a note that she was not working because she was ill. Thus while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was then ill, it is equally apparent, on the one hand, that the Regional Director's less positive finding as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944.

It should further be noted that for Kane's vote to have been determinative in reducing the election to a tie, every one of several factors would have had to have been resolved in line with the respondent's hypotheses. The Union's challenge of one unopened ballot made at the polls on May 5 would have had to have been overruled by the Regional Director. That ballot, upon being opened, would have had to have been cast against the Union. It would also have been necessary for the Regional Director to have found that a ballot which had been duly cast at the election in the presence of authorized observers for the respondent, which had not been challenged at the polls, and which had therefore not been segregated, but rather had been counted as valid along with the other valid ballots, could have been challenged four days after the polls had been closed. It would further have been necessary for the Regional Director to have found that Kane had not been an employee and had not been entitled to vote. It would then have been necessary either to have held a new election on the assumption that Kane might have voted for the Union, thus reducing the vote

to a tie,[30] or to have ignored the secrecy of the ballot and to have attempted to determine how Kane voted. If the latter course were to have been followed, the word of the voter, who would thus have been placed under pressure by having to reveal publicly how her ballot had been cast, would have had to have been accepted as final, since the ballot itself could not have been identified for examination. It is clear from the Regional Director's report that he believed that to have followed such a post-election procedure as the foregoing would have involved would have vitiated the Board's established election practices, and that in view of his ruling to that effect it became unnecessary for him to resolve other matters.

As to the question of negligence or laches, it should be noted that the Regional Director did not make any finding of negligence or laches but found rather, in effect, that the respondent had failed "through oversight" to correct the voting list or challenge
39 the eligibility of Kane at the polls and that under all the circumstances it would vitiate the Board's election procedure to permit a post-election challenge of her vote. It is evident that the Regional Director had in mind the problems of post-election procedure discussed above. Among the circumstances which he specifically cited were that the balloting had been duly conducted in the presence of two observers for the respondent who had failed to challenge Kane's vote and who had thereafter signed the Certification on Conduct of Election; that the list of eligible voters had been prepared solely by the respondent; that Kane's unemployment compensation application had been received by the respondent prior to the election; that whether Kane had been an employee entitled to vote had been peculiarly within the respondent's knowledge; and that no objection to Kane's vote had been raised until four days after the election. The Regional Director cited the American Granite Finishing case [31] as authority for his determination that "under the circumstances" the respondent had "waived its right." In the case cited, the only labor organization involved in an election which had been duly conducted sought, in effect, to dissipate a tie vote by deducting the ballots of two persons, who allegedly had voted against it, on the ground that both persons were clerical employees who were not properly within the appropriate unit. Both employees had been listed as eligible voters and both had cast unchallenged ballots. In deciding in that case that "under the circumstances" the labor organization had "waived its right" to oppose the result of the election, the Board relied upon such circumstances as the presence of the observer for the labor

[30] Under the terms of the consent agreement, the Regional Director had authority to void the result of the election and to conduct a new election. There is no evidence that the respondent at any time requested such a procedure.

[31] Matter of American Granite Finishing Company, 28 N. L. R. B. 739.

organization at the polls and his failure to challenge the two ballots or to object to the inclusion of the names of the two employees on the list of eligible voters.

At the hearing before the undersigned, no question was raised as to the regularity of the election involved in the instant matter. Also it was admitted that the respondent furnished the pay roll which contained Kane's name and which was the only pay roll used at said election. As to the respondent's knowledge of Kane's employment status, the evidence shows that the respondent's copy of Kane's application for unemployment compensation was in the respondent's files when Superintendent Elbery [12] looked for it on May 8; that it was stamped as mailed on "May 1, 1944"; that in the normal course of business it would have been received on Tuesday, May 2; and that it was customary for such matter to be placed on Superintendent Elbery's desk the date received. Elbery testified that he first found the application in the respondent's files upon making a search for it upon his return on May 8 from the office of United States Employment Service in Boston where he had gone in an effort to verify a statement made to him on the morning of May 8 by an unidentifiable employee in Kane's department to the effect that Kane should not have voted because she was not an employee and was working somewhere else.[13] The undersigned finds it difficult to credit Elbery's testimony that it was impossible for him to identify his informant, especially in view of the smallness of the respondent's plant, the recency of the event, and the investigation which Elbery testified was initiated as a result of that statement. But in any event, the Regional Director's opinion that the respondent failed to correct the voting list or to challenge Kane's eligibility at the polls "through oversight" is a temperate conclusion in view of all of the evidence in this case.

Upon the entire record, the undersigned concludes and finds that the Regional Director's certification of the Union upon the basis of the election of May 5, 1944, was neither arbitrary nor capricious and that, accordingly, it is binding upon the parties to the Agreement for Consent Election.[14]

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[12] John J. Elbery. The last name is spelled differently in the transcript as compared to the Regional Director's report cited above.

[13] There is no evidence that Kane has worked anywhere else.

[14] Matter of Capitol Greyhound Lines et al., 49 N. L. R. B. 156, enforced 140 F. (2d) 754 (C. C. A. 6), cert. denied, 64 S. Ct. 1285, and Matter of Aetna Fire Brick Company, 56 N. L. R. B. No. 168.

The following language in the Board's decision in the Capitol Greyhound case, holding the Regional Director's determination to be binding in the absence of a showing that his rulings were arbitrary or capricious, is noteworthy:

To hold otherwise would permit an employer deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuges for hampering and delaying a final determination of bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act.

It should also be noted that Article III, Section 12, of the Board's Rules and Regulations, Series 2, effective November 26, 1942, as amended, provides specifically concerning consent elections that "the rulings of the Regional Director shall be final, and the statement of the Regional Director of the results thereof shall be final."

C. The refusal to bargain collectively

1. The appropriate unit

The undersigned finds, in accordance with the Agreement for Consent Election, that all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment and that said unit insures to such employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Union of a majority in the appropriate unit

The undersigned also finds that at all times since May 5, 1944, the Union has been the bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union has been at all times since May 5, 1944, and now is, the exclusive representative of all of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

The undersigned further finds that on June 6, 1944, and at all times thereafter, the respondent has refused to bargain collectively with the Union as the exclusive representatives of its employees within the unit hereinabove found to be appropriate, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

41 IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The undersigned finds that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of law

1. Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), was on May 5, 1944, and at all times thereafter has been, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 6, 1944, and at all times thereafter, to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, A. J. Tower Company, Roxbury, Massachusetts, its officers, agents, successors, and assigns shall:

42 1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Post immediately in conspicuous places at its plant in Roxbury, Massachusetts, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the First Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that, unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, as amended, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of the said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the parties or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

Earl S. Bellman,
EARL S. BELLMAN,
Trial Examiner.

Dated: September 29, 1944.

47

Before the National Labor Relations Board
First Region

Case No. I-C-2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS' UNION (A F L)

ROOM 606, OLD SOUTH BUILDING,
294 WASHINGTON STREET,
Boston, Massachusetts, Thursday, August 3, 1944.

Pursuant to notice, the above-entitled matter came on for hearing at 10 a. m.

Before EARL S. BELLMAN, Esq., Trial Examiner.

Appearances Leo J. Halloran, Esq., and Samuel G. Zack, Esq.,

Boston, Mass., appearing on behalf of the National Labor Relations Board. George E. Roewer, Esq., 20 Pemberton Square, Boston, Mass., appearing on behalf of the Complainant Union. Robert G. Moch, Esq., Herrick, Smith, Donald, Farley & Ketchum, 1 Federal Street, Boston, Mass., appearing on behalf A. J. Tower Company, Respondent.

49 PROCEEDINGS

Trial Examiner BELLMAN. The hearing will be in order.

This is a formal hearing in the matter of A. J. Tower Company and Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers' Union (AFL), Case No. I–C–2416, for the National Labor Relations Board.

The Trial Examiner appearing for the National Labor Relations Board is Earl S. Bellman.

I would like to have all of the appearances stated orally for the record at this time.

Mr. HALLORAN. Leo J. Halloran, appearing for the Board.

Mr. MOCH. Robert G. Moch, appearing for the Company.

Mr. ROEWER. Appearing for the union is George E. Roewer.

Trial Examiner BELLMAN. At this time there are a few formal introductory remarks which I would like to make.

The official reporter makes the only official transcript of these proceedings. Citations in briefs or arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing. If so, the parties desiring the corrections will submit
50 the suggested corrections to the other party or parties in writing. When this has received their written approval it will be submitted to the Trial Examiner.

In the event that the parties are unable to agree upon proposed corrections, the Trial Examiner will then consider motions to correct the record or may, upon his own motion, order certain corrections made.

If the parties have not been able to agree upon such corrections before the close of the hearing but have entered into a stipulation concerning such matters after the close of the hearing but before the transfer of the case to the Board, such stipulations or motions should be addressed to the Trial Examiner in care of the Chief Trial Examiner in Washington.

After the transfer of the case to the Board all such communications should be directed to the Board itself, inasmuch as by such transfer to the Board the Trial Examiner's connection with the case ceases.

Since this is a formal hearing you will maintain the dignity and decorum which usually accompany judicial proceedings. I will also ask that you do not smoke in the hearing room while the hearing is actually in progress.

Concise statements of reasons for motions or objections will be permitted, but the Trial Examiner may go off the record for the purpose of hearing extended argument.

Off-the-record discussion or argument will not be included
51 in the official transcript unless an order to that effect be made by the Trial Examiner either at the request of the parties or upon his own motion. All requests to go off the record are to be directed to the Trial Examiner and not to the official reporter, please.

The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner. All exhibits offered in evidence shall be in duplicate.

At the conclusion of the hearing oral argument will be held before the Trial Examiner, during which he will feel free to discuss with and ask questions of counsel or representatives of the parties, with respect to their contentions as to the issues, the facts and the legal principles involved. This oral argument at the close of the hearing will be included in the stenographic report of the hearing.

Any party, upon request made before the close of the hearing, will be granted five days in which to file a brief with the Trial Examiner. Five copies of such briefs shall be directed to the Trial Examiner in care of the Chief Trial Examiner in Washington.

At this time counsel for the Board may proceed and present the formal papers.

52 Mr. HALLORAN. Will the official reporter mark this series of documents as "Board's Exhibit 1" for identification, and Board's Exhibit 1 for identification, Duplicate.

(Thereupon the documents above referred to were marked as "Board's Exhibit No. 1" for identification.)

Offers in evidence

I now offer in evidence what has been marked as "Board's Exhibit 1" for identification and "Board's Exhibit No. 1" for identification, Duplicate, consisting of the following formal papers in the case:

Notice of hearing in the instant case, signed by A. Howard Myers, Regional Director for the First Region, dated July 24, 1944;

Complaint issued by A. Howard Myers, Regional Director of the Board for the First Region, dated July 24, 1944;

Affidavit as to service of the aforementioned documents, showing service of the same, with return postal registry receipts showing receipt of the same, the affidavit being subscribed and sworn to by Doris Glassman, before Martha R. Dunleavy, Designated Agent for the Board, showing service of the foregoing on A. J. Tower Company and on Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (AFL).

Also as part of this exhibit I offer a copy of the charge filed by George E. Roewer, attorney for Local No. 24, Waterproof Garment Workers Union affiliated with Interna-
53 tional Ladies' Garment Workers Union (AFL), and further, as part of this exhibit, I offer the answer filed by A. J. Tower Company.

Trial Examiner BELLMAN. Is there any objection to this exhibit, these documents described [handing Board's Exhibit 1 for identification to Mr. Moch?]

Mr. MOCH. The respondent has no objection.

Trial Examiner BELLMAN. Has the Union any objection?

Mr. ROEWER. No objection.

Trial Examiner BELLMAN. There being no objection, the documents are received in evidence as Board's Exhibit 1.

(The documents heretofore marked as Board's Exhibit 1 for identification, were received in evidence.)

Are there any other formal papers of this type now?

Mr. HALLORAN. There are no other formal papers of this type.

Trial Examiner BELLMAN. Are there any preliminary motions of any kind by any of the parties? (No response.)

There appear to be none.

I would like to spend a little time in studying the answer and comparing it with the complaint.

The hearing will be in recess for ten minutes.

(Recess for ten minutes, following which the hearing was resumed.)

The hearing will be in order.

54 Mr. HALLORAN. My attention has been directed to a slight error in paragraph 4 of the complaint, and at this time I move to amend the complaint in this action, in paragraph 4 thereof, by adding after the words "employees of the company," in the first line, the words "at its Roxbury plant," so as to read "all

employees of the company at its Roxbury plant, except for executives, foremen" and so forth.

The amendment is offered because the attorney for the Board has been advised by counsel for the company that the company does have other plants.

Trial Examiner BELLMAN. Does the company have any objection to this amendment?

Mr. MOCH. None.

Trial Examiner BELLMAN. The amendment merely adds four words, "at its Roxbury plant"?

Mr. HALLORAN. That is correct.

Trial Examiner BELLMAN. The amendment is granted.

In view of the amendment does the respondent care to amend the answer?

Mr. MOCH. I move to amend the answer by striking out the fourth paragraph of the answer and substituting therefor, "The respondent admits the allegations set out in paragraph 4 of the complaint."

Trial Examiner BELLMAN. Is there any objection to so amending the answer? (No objection.)

55 Hearing none, the answer is so amended.

Mr. HALLORAN. Will the official reporter mark this document as "Board's Exhibit 2" for identification and "Board's Exhibit 2" for identification, Duplicate.

(Thereupon the document above referred to was marked as "Board's Exhibit 2" for identification.)

I now offer in evidence what has been marked for identification as "Board's Exhibit 2," being a stipulation entered into on August 2, 1944, between the attorney for the Company and the attorney for the Board.

Do I understand that the company stipulates orally at this time that it is engaged in interstate commerce and is subject to the provisions of the National Labor Relations Act?

Mr. MOCH. I do not think that we can stipulate that. That is a conclusion of law. I think there is not any dispute as to the facts, and that is the conclusion to be drawn therefrom.

Mr. HALLORAN. Will the company admit, for the purpose of this hearing, that it is engaged in interstate commerce?

Mr. MOCH. Yes.

Mr. HALLORAN. And that it is subject to the provisions of the National Labor Relations Act?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. I would like to point out at

56 this time that the stipulation is signed only by the company and by the Board and that the stipulation covers more than

commerce. The document marked as Board's Exhibit 2 for ide
tification stipulates as to the nature of the union, as to certa
facts concerning a consent election agreement and also as to t
request to bargain and refusal.

It appears that the union is a party to this proceeding and
represented by counsel. I should like to go off the record to s
if the union wants to join in this stipulation.

Mr. HALLORAN. May we go off the record?

Trial Examiner BELLMAN. Off the record.

(Discussion off the record.)

On the record.

Mr. HALLORAN. Counsel for the union has assented in writi
on the stipulation, to the allowance of the stipulation.

Trial Examiner BELLMAN. In other words, he is joining in t
stipulation and signing it as a document in evidence?

Mr. ROEWER. That is correct.

Trial Examiner BELLMAN. Is there any objection to the doc
ment being received as Board's Exhibit 2? [No objection.]

There appears to be no objection. The document is admitted as Board
Exhibit 2.

(The document heretofore marked as "Board's Exhibit 2" f
identification, was received in evidence.)

57 Mr. HALLORAN. Will the official reporter kindly mark th
series of documents as "Board's Exhibit 3–A, 3–B, 3–
3–D and 3–E" for identification, in duplicate.

(Thereupon the documents above referred to were marke
as "Board's Exhibits 3–A, 3–B, 3–C, 3–D and 3–E" for identi
cation.)

I now offer in evidence what has been marked as "Board's E
hibit 3–A to 3–E" for identification, consisting of the followi
documents:

As Board's Exhibit 3–A, copy of the petition for certificati
of representatives signed by Nathan H. Barker, Manager of Loc
No. 24, dated April 24, 1944:

As Board's Exhibit 3–B, copy of agreement for consent ele
tion, dated April 27, 1944, signed by Albert Fraioli, Assistant Ma
ager of the Union, by F. A. Newman, General Manager of t
Company, and by the Field Examiner, James J. McFadden, a
by A. Howard Myers, Regional Director for the First Region;

As Board's Exhibit 3–C, copy of certification on conduct
election, dated May 5, 1944;

Board's Exhibit 3–D, copy of tally of ballot, dated May
1944;

Board's Exhibit 3–E, report on objections to election, whi
also contains certification of union as the bargaining agent, dat
May 24, 1944.

58 As an explanatory note I would add that the papers referred to in this exhibit concern Case No. I-R-1880.

Trial Examiner BELLMAN. These, I understand, are the matters referred to in part in the stipulation which is in evidence as Board's Exhibit 2?

Mr. HALLORAN. That is correct.

Trial Examiner BELLMAN. Is there any objection to this group of documents being received as identified [handing Board's Exhibits 3-A to 3-E for identification to Mr. Moch]?

Mr. MOCH. I have no way of telling whether these are true copies.

Trial Examiner BELLMAN. Take as much time as you want.

Mr. MOCH. I have not the original petition.

Trial Examiner BELLMAN. Here are the originals [handing papers].

Mr. MOCH. I have no way of telling whether these conform to the originals. I have no reason to think that they are different.

Trial Examiner BELLMAN. Can the originals be produced for the purpose of comparison?

Mr. HALLORAN. Certainly.

Trial Examiner BELLMAN. The hearing will be in recess for five minutes for the purpose of comparing the documents offered, with the original documents in the files.

The hearing will be in recess for five minutes.

(Recess for five minutes, following which the hearing
59 was resumed.)

The hearing is in order.

Have you now had sufficient time, Mr. Moch, for purposes of comparison?

Mr. MOCH. Yes; and as corrected there is no objection.

Trial Examiner BELLMAN. Has the union any objection?

Mr. ROEWER. No objection.

Trial Examiner BELLMAN. The Board agrees that the corrections may be made in longhand on the exhibits?

Mr. HALLORAN. Yes.

Trial Examiner BELLMAN. The documents are admitted in evidence as Board's Exhibits 3-A, 3-B, 3-C, 3-D and 3-E.

(The documents heretofore marked as "Board's Exhibits 3-A, 3-B, 3-C, 3-D and 3-E" for identification were received in evidence.)

Mr. HALLORAN. Will the official reporter mark this copy of letter dated May 25, 1944, and copy of letter dated June 6, 1944, as "Board's Exhibits 4-A and 4-B" for identification.

(Thereupon the documents above referred to were marked as "Board's Exhibits 4-A and 4-B" for identification.)

I now offer in evidence what have been marked as "Board's Exhibits 4–A and 4–B" for identification, the first being a copy of a letter dated May 25, 1944, to A. J. Tower Company, 18 Simmons Street, Roxbury, signed by George E. Roewer, Attorney for International Ladies' Garment Workers' Union, and copy of a letter dated June 6, 1944, to Messrs. Roewer & Reel, signed by John T. Noonan, Attorney for the Company.

60

I am offering the letter of May 25, 1944 as Board's Exhibit 4–A, and the letter of June 6, 1944, as Board's Exhibit 4–B.

Trial Examiner BELLMAN. Will the parties stipulate that these are copies of the documents which they prepared and that they were sent.

Mr. ROEWER. The union will so stipulate.

Trial Examiner BELLMAN. Will the respondent so stipulate?

Mr. MOCH. It is so stipulated.

Trial Examiner BELLMAN. The Board so stipulates?

Mr. HALLORAN. The Board so stipulates.

Trial Examiner HALLORAN. The documents may be admitted in evidence as "Board's Exhibits 4–A and 4–B."

(The documents heretofore marked as "Board's Exhibits 4–A and 4–B" for identification were received in evidence.)

Mr. HALLORAN. The Board rests.

Trial Examiner BELLMAN. Does the union have any evidence which it wishes to offer, in addition to the evidence which has been presented by the Board?

Mr. ROEWER. No, Mr. Trial Examiner. The Union rests.

Trial Examiner BELLMAN. Is the respondent ready to proceed at this time? Or do you wish a short recess, Mr. Moch?

61

Mr. MOCH. I think we are ready to go ahead.

Trial Examiner BELLMAN. The respondent may go forward with his case at this time.

Mr. MOCH. Would you like to have me make a short statement of what the respondent's case is going to consist?

Trial Examiner BELLMAN. If you would like to do that it would be helpful. Will you also indicate, in so doing, the major contentions and points of law upon which you rely?

Mr. MOCH. As indicated by the exhibits which have been offered, there was a consent election agreement signed and executed and an election was held pursuant to that agreement. That election was held on May 5, 1944, after which the ballots were counted, the count at that time standing 116 votes for the union and 114 votes against, with one ballot challenged by the union.

The lists which were made up by the respondent to show the employees who were entitled to vote, were made up, I believe, as

of April 15, or for the week ending that date. I might be mistaken but I think that is correct.

At that time there appeared on our pay roll a lady by the name of Mrs. Jennie A. Kane who, we thought, was ill. We put her on the list and so marked the list.

Trial Examiner BELLMAN. When you say you so marked
62 the list, you marked on the list that she was ill?

Mr. MOCH. That is right. On the first working day after the election one of the employees who voted said that Mrs. Jennie A. Kane was not an employee and so told the company. Subsequent investigatoin showed that Jennie A. Kane was not an employee.

There lies the whole basis for the respondent's contention that the union has not been validly certified as the bargaining agent, because if that vote is thrown out and a challenge as to one ballot, made by the Union, is not sustained, and upon opening that ballot it shows that it is a vote against the union, the election will be a tie. Of course, if the election is a tie, the union has not been certified and has no standing to be certified under the Act as the bargaining representative of the employees in the union.

In order to substantiate these contentions I will call Mr. Elbery.

Trial Examiner BELLMAN. You have presented these matters, Mr. Moch, to the Regional Director?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. The Regional Director made rulings which are set forth in a document which is in evidence?

Mr. MOCH. That is right.

Trial Examiner BELLMAN. What is your contention as to
63 those rulings?

Mr. MOCH. We will contend that that ruling cannot stand in the face of the evidence which we will present.

First, you cannot count the vote of a nonemployee in accordance with the agreement. If you consider the agreement binding you cannot count the vote of a nonemployee.

Any finding by the Regional Director that Mrs. Kane was an employee was so contrary to the evidence presented as to be an arbitrary decision and, therefore, cannot stand.

Even beyond that, the Regional Director made no finding that Mrs. Kane was an employee. His only finding was that the company had waived its right to object to her vote, because of negligence or laches. In that respect there was no evidence that the company was negligent in any regard or that any laches should be attached to it and, therefore, the ruling had no reasonable support in fact.

The agreement stated that only employees were to vote, em-

ployees who were in the unit. On the basis of that agreement, if Mrs. Kane was not an employee, she was not entitled to vote, irrespective of any laches or negligence on the part of the company.

The agreement specified employees, and Mrs. Kane was not an employee and was not entitled to vote. That closed the matter. So that the Regional Director's ruling cannot stand on the agreement.

64 Beyond the agreement, the Regional Director's ruling was based upon a private contract between the Union and the Company and, irrespective of any ruling on that agreement, we contend that if Mrs. Kane was not an employee, she would not be entitled to be included, and her vote—or whatever means you have of designating a majority—if she was not an employee at the time, would not be entitled to be considered because it would, in effect, vitiate the provisions of the National Labor Relations Act.

This is a proceeding charging a violation under an Act that provides that representatives must be chosen by employees, and no private agreement can vitiate that. No private agreement can make it possible to choose a bargaining representative by a vote of a group of employees and nonemployees.

Under the Act it is up to the Board to protect the rights of the employees that vote "No." Even if the company and the union had said in the consent agreement that Mrs. Kane was entitled to vote, if she was not an employee, no bargaining agent could be certified under the Act, if her act was controlling in the determination of the majority.

Mr. HALLORAN. I do not object to an opening statement setting forth what counsel intends to show, but I think we should not have final argument at this time.

Mr. MOCH. I was asked our contention as to this ruling
65 of the Regional Director.

Trial Examiner BELLMAN. Have you anything further?

Mr. MOCH. I am making a rather long statement on this because I know that the Board and the union feel that we should not go behind the ruling of the Regional Director.

This is probably a very important portion of the case and I am trying to put it as clearly as I can.

In substantiation of my point of law that Mrs. Kane's vote cannot be counted because the Act would be vitiated if it were counted, there is a case, if you wish me to give cases to you?

Trial Examiner BELLMAN. Later you can argue this fully. If you have anything to point up what the company's general contention is, you may go ahead now.

You asked to make an opening statement, and I had this one question on which I wanted to get your general position.

Mr. MOCH. I will ask Mr. Elbery to take the stand.

JOHN J. ELBERY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MOCH:

Q. Your name, Mr. Elbery?—A. John J. Elbery.

Q. Your position with A. J. Tower Company?—A. Factory superintendent.

66 Q. You are in charge of the entire plant?—A. That is right.

Q. In Roxbury?—A. That is right.

Q. You are acquainted with the election which was held on May 5?—A. Yes.

Q. That was on a Friday?—A. That is right.

Q. Do you run the plant on Saturday or Sunday?—A. No.

Q. Did you run the plant on Saturday, May 6th?—A. Not the stitchers.

Q. Or on Sunday?—A. Not the stitchers.

Q. No stitchers worked on Saturday or Sunday?—A. That is right.

Q. Monday was the first day after the election that the stitchers worked?—A. That is right.

Q. Mrs. Jennie Kane was a stitcher?—A. Yes.

Q. On that Monday did one of the stitchers come to you with any information concerning the election?—A. That is right. She did.

67 Q. What stitcher was it, do you remember?—A. I do not recall at the moment.

Trial Examiner BELLMAN. This would be Monday, May 8th?

The WITNESS. The 7th, I believe.

Mr. MOCH. It is the 8th.

The WITNESS. That is right.

Q. On Monday what did this employee tell you?

Mr. HALLORAN. I object.

Trial Examiner BELLMAN. I will hear you, Mr. Halloran.

Mr. HALLORAN. Whatever this employee said would be hearsay, may it please the Trial Examiner.

Trial Examiner BELLMAN. Are you ready to present the employee who made the statement, Mr. Moch?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. Is the employee available?

Mr. MOCH. At the moment I do not even know who she is.

Trial Examiner BELLMAN. This is your witness. You have some idea surely.

Mr. MOCH. An employee came up to the witness and made a statement to him which he can relate.

Trial Examiner BELLMAN. I will hear his testimony. After it is in I will entertain a motion to strike.

Mr. HALLORAN. My second objection is that if the purpose of this interrogation is to go behind the Regional Director's
68 certification, I should object to it in all subsequent questions pertaining to the same subject matter.

My ground for that is that the agreement for the consent election was entered into by the parties.

Mr. MOCH. What does counsel mean by "go behind the Regional Director's certification"?

Mr. HALLORAN. I think that language is understandable.

Trial Examiner BELLMAN. If this line is for that purpose, you will go behind the Regional Director's certification?

Mr. MOCH. I think that is probably what it is.

Trial Examiner BELLMAN. If this line is for that purpose, you may go ahead, Mr. Halloran, and state the Board's position.

Mr. HALLORAN. In the agreement for the consent election executed by the union and by the company and signed by the Regional Director and the Field Examiner, for the Board, it is provided that said election shall be held in accordance with the National Labor Relations Act, the Board's rules and regulations, and the customary procedures and policies of the Board, and it is further provided that the determination of the Regional Director shall be final and binding upon any questions, including questions as to the eligibility of the voters, raised by any party hereto, relating in any manner to the election.

The parties having entered into such an agreement, I submit to the Trial Examiner that the Regional Director
69 shall pass upon the eligibility of any voters and such determination by the Regional Director is absolutely binding on the parties, and any attempt to go behind a decision subsequently made by the Regional Director relative to the eligibility of the voters—such decision being based upon this agreement for a consent election—is a nullification of the entire purpose and intent of the agreement for consent election. Can parties enter into such an agreement and subsequently at their pleasure declare that such an agreement means nothing?

I direct your Honor's attention to a decision in the sixth circuit in the case of National Labor Relations Board v. Capitol Greyhound Lines, reported in 13 L. R. R. 729, decided January 31, 1944. Certiorari was denied by the Supreme Court on June 12, 1944. The Court held in effect, as follows:

"We find that the Regional Director's ruling was neither arbitrary nor capricious. In the absence of such conduct, we feel ourselves bound by the terms of the Director's determination to the same extent as a Court is bound by an agreement to abide by an

arbitrator's award. To hold otherwise would permit an employee deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuge for hampering and delaying a final determination of a bargaining
70 representative; and would tend to defeat rather than to effectuate the policies of the Act."

I press my objection on behalf of the Board, may it please the Trial Examiner, and ask that all evidence which tends to go behind the Regional Director's certification, be excluded.

Mr. ROEWER. The union likewise objects to this line of inquiry and bases its objection on the finality of the Regional Director's decision.

Trial Examiner BELLMAN. If the vote of Jennie Kane, involved in this, were not counted, it would leave the election in the position of being 115 to 114?

Mr. HALLORAN. That is correct.

Mr. MOCH. With one vote not counted.

Trial Examiner BELLMAN. In ordinary course that vote might determine the result of the election.

Mr. MOCH. Assuming that we have knowledge of how Jennie Kane voted.

Trial Examiner BELLMAN. She was not challenged at the polls?

Mr. HALLORAN. That is correct. May I say one further word on the point, which may or may not assist?

Trial Examiner BELLMAN. Yes.

Mr. HALLORAN. The finding in the sixth circuit in the Capitol Greyhound Lines case shows very clearly that in the
71 absence of arbitrary or capricious conduct on the part of the Regional Director, the Court must accept the Regional Director's finding.

When requested by you to set forth the position of the company as to what evidence the company intended to present, I observed that my brother made no contention that he was going to show that the action of the Regional Director was capricious. He indicated that he might show that it was an arbitrary decision merely because the Regional Director passed upon that vote, which in itself is not an indication of being arbitrary.

Trial Examiner BELLMAN. I am trying to visualize this whole problem.

How could the Regional Director throw out that particular vote if it was not challenged at the polls? Was it segregated in any way?

Mr. MOCH. No. We have evidence showing how she voted.

Trial Examiner BELLMAN. What about the secrecy of the ballot?

Mr. MOCH. She is not an employee.

Trial Examiner BELLMAN. In other words, you contend that even if she participated in the election, and cast a ballot which was not challenged, and hence was not segregated, and went into the sum total of the ballot undifferentiated, that inasmuch as she was not an employee and you found out afterwards how she voted, the Regional Director then should have subtracted her vote?

72

Mr. MOCH. Yes, sir.

Trial Examiner BELLMAN. Subtracted her vote from the vote of the side that she voted for?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. You found out, according to your contention, that she voted for the union or against the union?

Mr. MOCH. For the union.

Trial Examiner BELLMAN. And, therefore, the Regional Director, on your representation to him, after the election was over, should have subtracted one vote from the 116 for the union?

Mr. MOCH. That is right.

Trial Examiner BELLMAN. It is your contention then that, having failed to do so, the election for certification is invalid for what reason?

Mr. MOCH. Because it was not in accordance with the consent agreement.

Trial Examiner BELLMAN. Assuming the Regional Director to be the final authority, you say it was not in conformity with the explicit provisions of the consent agreement?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. What explicit provision is involved?

73

Mr. MOCH. The agreement stipulated that the election was to be held among the employees and that the unit—the employees of which were entitled to vote—was composed only of employees.

Let me take an example. Say that Mrs. Kane on May 1 or the latter part of April, had gone over to some other company and started to work and worked there eight hours a day and that on the day of the election she came in and voted. We did not know where she was working. We had no idea where she was working. If that should have been the fact I don't think anybody would have made any contention that we should ascertain how she voted, or that there would be any question that that vote should be thrown out.

Mr. ROEWER. May I say a word?

Trial Examiner BELLMAN. Yes.

Mr. ROEWER. Of course, the Trial Examiner has in mind that the eligibility list was furnished by the company and they rep-

resented to the union that Mrs. Kane was an employee and that other names on the list were the names of people in the employ of the company.

Naturally the company is in a position to determine the eligibility rather than the union. The union relied on the eligibility list which was furnished by the company prior to the election. At the time of the election, although the company
74 had an opportunity to challenge anybody, it did not challenge Mrs. Kane. And they represented she was entitled to vote at the time the list was made out.

Trial Examiner BELLMAN. Your position is that you did not know at the time of the election that she was not an employee.

Mr. ROEWER. Yes.

Mr. MOCH. That argument simply goes to whether the Regional Director's ruling is correct, not as to whether or not you can go behind it. It is our contention that we had no way of knowing that she was not an employee at that time.

Mr. HALLORAN. We do not agree with everything counsel has said. We do not agree that she was not an employee at that time.

Trial Examiner BELLMAN. The Regional Director's ruling was not based on that particular question, however. It seems to me the Regional Director's ruling did not resolve that particular point, as to whether or not she was an employee, but made certain other findings.

Mr. HALLORAN. We do not agree that the Company had no knowledge, as has been so emphatically set forth by counsel.

Trial Examiner BELLMAN. Suppose we let counsel for the Company stick to this brief recapitulation of position.

Mr. MOCH. My first point, that I elaborated on before, was that according to the agreement Mrs. Kane should not have been
75 allowed to vote if she was not an employee, according to the agreement itself.

Even beyond that, and assuming that the Regional Director's ruling is binding, and this is a proceeding under the National Labor Relations Act, and that ruling was a ruling based on a private agreement which secured no vitality from the National Labor Relations Act or from any public body it was a private agreement and nothing in that agreement or any rules based on it can vitiate the labor relations act, which states that in order to certify a bargaining representative, the bargaining representative has chosen and must be chosen by a majority of the employees. The only way this union can become the bargaining agent is by being the representative of the majority of a group of employees. If the group consists of employees and nonemployees, the Act is going to be vitiated.

Counsel for the Board has cited the Capitol Greyhound case.

If you wish me to go into that I can distinguish between that case and the present case. I also have a board case which indicates that a ruling of the Regional Director cannot be used to violate the provisions of the National Labor Relations Act.

Another case which substantiates the contention I made a moment ago is one in which the Third Circuit Court held that this agreement does not have any vitality under the act.

Trial Examiner BELLMAN. Getting back to the Capitol
76 Greyhound case, do you contend that the rulings as made by the Regional Director are in any way arbitrary or capricious?

Mr. MOCH. I do not want to say that they are capricious, but I think that they are arbitrary inasmuch as the ruling that was made is not substantiated by any competent evidence. I would go so far as to say that they are not substantiated by any evidence.

Trial Examiner BELLMAN. I think you might as well go ahead and present your argument and your cases now, because it appears from the way the issues are shaping up, that the contentions might as well be fully stated now as some time later.

Mr. MOCH. The Board, I believe, has the duty and the right to uphold the rights of those employees who voted "No" in the election, those employees who do not want the union.

Here we have a case where there was a very close election. It is the duty of the Board to protect the rights of those who do not desire to have this union represent them.

As I stated before, the act itself provides that the representatives must be designated by a majority of the employees, and no group of employees and nonemployees can be used to determine a majority to represent employees. That is really the basis of the contention, that the ruling of the Regional Director cannot vitiate the Act. That is really the ultimate reason.

77 In the Automatic Products Company case, 40 N. L. R. B. 941, the union and the employer entered into an agreement for a consent election. In connection with that the Regional Director drafted and sanctioned a provision which provided that if the union lost the election it should refrain from seeking recognition for a year. It lost the election and came back and sought recognition. The Court said it would not enforce a provision where the enforcement would defeat rights guaranteed under the Act. Our contention is that the enforcement of this ruling of the Regional Director would likewise defeat rights guaranteed by the Act.

In Sun Ship Employees Association v. N. L. R. B., decided in the Third Circuit Court of Appeals, recorded in 13 L. R. B. 583, there was a consent agreement. Objections were heard by the Regional Director and a determination made by him, and the

Board refused a rehearing. The side that was injured took it to Court, and the Court refused jurisdiction. In doing so it said there was no Federal statute involved, that the consent agreement derived no vitality from any statute or public body, that it was simply a private agreement. Hence there was no statute involved and it could not take jurisdiction.

So that this agreement from which the ruling of the Regional Director stems, cannot be said to be a determination under
78 the statute; it cannot be used to vitiate the provisions of a statute which makes certain specific provisions and guarantees the rights of all employees.

Our contention under this portion of my argument is that these 115 employees—or at least 114 employees—who would have voted against the union, cannot have their bargaining rights placed in the hands of this union on the vote of a nonemployee.

To distinguish the Capitol Greyhound case from the present case: In that case—and I am speaking from memory now—there was a consent agreement that a list of bus drivers should be made up some time in July—July 15. About August 1, one Nolan was employed as a bus driver. The list was made up by the company from the pay roll of August 15 instead of July 15. At the election that was held I think no objection was made to Nolan. Thereafter the company filed objections to the conduct of the election and the Regional Director overruled the objection.

There was a hearing similar to this one in which a Trial Examiner heard the testimony and threw out the vote of Nolan. Incidentally, I think Nolan testified that he voted for the union.

Incidentally, the union and the company agreed that the list would be the sole and exclusive list.

In the Capitol Greyhound case the Board overruled the Trial Examiner and the decision of the Board was appealed to
79 the Court.

You will note that there are at least three distinctions. First of all, Nolan was employed in the unit at the time of the election, exactly the opposite of the present case, and this is most important. We contend that Mrs. Kane was not an employee and was not in the unit.

Secondly, in the Capitol Greyhound case the list was the sole and exclusive list. No such agreement existed here. In fact we wanted such an agreement and the union would not agree.

Another important distinction was that in the Capitol Greyhound case the Company was negligent in making up the list as of the wrong pay-roll date, and the facts were peculiarly within their knowledge. They knew that Nolan was employed by them

after the time that the list was made up. They made up the list as of the wrong date.

You can find nothing in this case to indicate that the fact that Mrs. Kane was not an employee, was peculiarly within the knowledge of the company or that they were in any way negligent in not finding it out. I think that rather effective distinguishes the Capitol Greyhound case.

Mr. HALLORAN. If I might interpose at this moment, did I understand you to say that the list that was turned over to the Board in the instant case was not the sole and exclusive list of eligible voters?

80 Mr. MOCH. There was no such agreement between the union and the company.

Mr. HALLORAN. Isn't it a fact that the Company turned just one list over to the Board in the present case?

Mr. MOCH. That is correct, but there was no agreement that that was to be the sole and exclusive list.

Trial Examiner BELLMAN. Did anybody contend that another list should be used during the election?

Mr. MOCH. No.

Trial Examiner BELLMAN. No second list was placed before the board?

Mr. MOCH. No.

Trial Examiner BELLMAN. The Board was not requested to use a second list?

Mr. MOCH. No.

Trial Examiner BELLMAN. In the actual operation of the election that was the only list that was used?

Mr. MOCH. Correct.

Trial Examiner BELLMAN. That is the list referred to in the document already in evidence, the list which the company prepared?

Mr. MOCH. Correct.

Mr. HALLORAN. You will agree that the consent election agreement included a clause that at a date fixed by the Regional

81 Director the employer should furnish to the Regional Director an accurate list of all the eligible voters together with a list of the employees, if any, specifically excluded from eligibility?

Mr. MOCH. Certainly. In the Capitol Greyhound case, which I am distinguishing from the present case, in addition to that, the parties agreed that that list would be considered the sole and exclusive list. There was no such agreement here. Although we tried to get the union to agree to that, they absolutely refused to do so.

Trial Examiner BELLMAN. There appears to be no disagreement

as to how this list was made up, as to its being the only list and as to its being the list furnished in conformity with the agreement for the consent election?

Mr. ZACK. My name is Samuel C. Zack, and I am Regional Attorney.

In view of the question raised by the Trial Examiner as to whether or not it is the respondent's contention that the action of the Regional Director might be termed capricious or arbitrary—the Examiner asked the attorney for the company whether or not they were raising that—I recall that counsel for the company stated that he did not contend it was capricious.

In connection with whether or not the action of the Trial Examiner might have been arbitrary in connection with his ruling on the "R" case, the fact is there were at least two
82 conferences—and probably three—conducted by the Regional Director, at which other counsel for the company, Mr. Noonan, was present representing the company; counsel for the union was present as well as, I think, the witness and other representatives of the company.

The matter of the issues raised by the Company's protest was gone into very thoroughly at both of those conferences—or at the three conferences if three were held. The Regional Director assigned an examiner out of this office to conduct an investigation for him and to interview all of the necessary witnesses. Those investigations were carried on at his direction in order to ascertain the true state of affairs, so that he might, in rendering his decision, under the consent election agreement have before him all of the pertinent facts and arrive at a proper conclusion.

I submit that the action of the Regional Director in affording an opportunity to the parties to raise objections to his report, certainly does not indicate that his actions were in fact arbitrary in arriving at the determination as set forth in the report on objections.

I also want to state, as stated by Mr. Halloran, that we do not agree with the statement of counsel for the company that this Mrs. Kane did vote for the union. The fact is that counsel for the company could have this woman available here. They
83 have stated, in any event, that she is not to be presented at the hearing today.

Mr. MOCH. I have not stated that.

Mr. ZACK. I thought you stated that she would not be here to testify.

Mr. MOCH. I have not as yet.

Mr. ZACK. We do not agree that she voted for the union. There is no evidence before the Trial Examiner that she did so vote.

I might point out too—and I will refer you to the Regional Director's report on objections—that, as a matter of fact, having in

mind the language of the Capitol Greyhound case, where the Court stated that the facts with relation to the employee as a person in question, were peculiarly within the knowledge of the company, it has appeared that the election in this case was held on May 5. The company was notified—and I think Mr. Noonan admitted—that on May 1 Mrs. Kane had made application for employment elsewhere. Certainly four days before the election was held the company had notice with reference to a possible change of status of this woman.

Mr. MOCH. We do not admit that. Mr. Noonan never admitted that.

Mr. ZACK. Whether or not you admit it, the Director's report states it.

Trial Examiner BELLMAN. The Director's report is in evidence and I can tell by reading the Director's report.

84 Mr. ZACK. I call your attention, Mr. Trial Examiner, to page 3 of the Regional Director's report on objections, the second paragraph on that page [reading]:

"A Notice To Employer of Claim Filed was sent to the company by the U. S. Employment service on May 1 1944, the same day on which the Company submitted 'a complete list of employees of the A. J. Tower Company on the payroll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944.'"

Even though they contend that they did not receive it, it may be pertinent to say here that Mr. Noonan said he would not deny that they received it. Certainly in the ordinary course of the affairs of the United States Post Office you have a right to assume that that notice was delivered to the company.

I am not raising the issue. I am merely pointing out that the distinction made between this case and the Greyhound case is not a valid one, because we contend that the examination made by the Director shows that four days before the election the Company knew of a possible change of her status, and at no time prior to the election did they take any steps to apprise any of the parties of a possible change or to advise us. On the very day of the election, in accordance with the terms of the agreement, repre-

85 sentatives were present and did not challenge this Mrs. Kane when she appeared.

The distinction attempted to be drawn is not valid, and, in view of all the circumstances, I submit the Examiner ought not to hear any testimony in the absence of any showing of capricious or arbitrary action on the part of the Director. You should not go into any of the facts in view of this consent election agreement entered into by the parties. To do so would be to make a mere sham of the consent election conducted by the Board, a type of

election which is carried on through all of our regions, and this procedure, with the exception of one or two instances, has never been challenged. It was challenged once in the Sun Shipbuilding case and that was kicked out of court. It is now in the State court and no decision has been made. Certainly the Federal court would have nothing to do with it.

In the discussion of the decision they say it is an agreement between the parties to which the Board is a party. The Regional Director and the Field Examiner acquiesced in it. It is not correct to say that it is a private agreement to which the Board is not a party. We are a definite party. The signature of the Director is on there as the officer of the Board who agreed to it and the signature of the Field Examiner is on there. It is part and parcel of our procedure. If there is any merit to this procedure, which has been in effect in dealing with labor relations
86 throughout the country, by which the problems of labor and management have been settled now for almost nine years, I say it is valid and ought to be upheld and the contention made by Mr. Halloran ought to be sustained.

Trial Examiner BELLMAN. To clear up one point, Mr. Moch, you are not claiming that the Regional Director's decision was capricious?

Mr. MOCH. Only arbitrary, so far as the finding of laches on the part of the company is not sustained by any evidence.

Trial Examiner BELLMAN. You are not contending that the Regional Director was arbitrary in his manner of conducting the investigation?

Mr. MOCH. No.

Trial Examiner BELLMAN. Or in his failure to give the company full opportunity to present all of the evidence which it wished to present to him?

Mr. MOCH. Not in any respect. It was very fair and very impartial. Everything was fine in that respect. He gave us every opportunity. There was nothing arbitrary about that at all, not a thing.

Trial Examiner BELLMAN. Your contention is that the finding that the Regional Director made, that you should have challenged this vote at the election rather than to have made your contention later, is an arbitrary ruling?

Mr. MOCH. There is nothing whatsoever to support the
87 finding of negligence on the part of the company.

Trial Examiner BELLMAN. Is that the only sense in which you are making the contention that there was an arbitrary action?

Mr. MOCH. That is right. So far as the method of procedure, there is nothing arbitrary about that at all.

Mr. Zack claims that the Capitol Greyhound case is not dis-

tinguishable because Mrs. Kane was an employee. I submit that my contention is as good as his in that there is no evidence before you on which to decide one way or another.

As to the consent agreement, this procedure which we are now challenging was overturned by the Court in the Automatic Products Company case. In the Sun Shipbuilding case, contrary to what I understood Mr. Zack to contend, the Court said that the action of the Regional Director was no different than the action of a minister or other private individual.

Evidently we are arguing here over technicalities as to whether we should go ahead or whether we should not go ahead, because of procedure.

To all intents and purposes this is a big, fine, self-respecting union. I should think if they want to bargain for the employees of the A. J. Power Company, they would not be placing their entire case upon the vote of somebody who has not worked in
88 the plant since March 24, 1944, who has stated in more than one instance, in writing, that she does not intend to work there, that she has left and she will never, in all probability, be a part of the unit for which these people are bargaining and could not be for the reason that she is not physically capable of working. If this union really wants to represent the employees of the Tower Company, I should think that they would not want to do so on such a tainted vote. If they can show a majority, let them show it.

Trial Examiner BELLMAN. I think we are getting a little off the track here.

Mr. ROEWER. I just want to say this, that according to our record this woman has informed us that she did intend to return to work; she had not given up her job at the Tower plant and she is still a member of the plant. Moreover, because of interference on the part of supervisory help within the plant—and we have evidence of that—against this union, we are insisting upon our right of certification under this election.

Trial Examiner BELLMAN. That is getting off onto matters that are not before me at all.

Mr. ROEWER. That is right.

Trial Examiner BELLMAN. You gentlemen will have to watch your tendency to go afield and to dig into a substrata of misunderstanding and resentment, because those are not in issue here.

If the respondent went ahead with the presentation of
89 evidence, what, in general and as briefly as possible, would you want to establish by evidence?

Mr. MOCH. Solely that Mrs. Kane at the time of the election was not an employee and how she voted. There is also the question of the other ballot.

Trial Examiner BELLMAN. It seems to me you cannot bring the other ballot into the picture until there is a decision indicating whether the other ballot would be material in that it could affect the result of the election. You are not going to put in any evidence about that other ballot, are you?

Mr. MOCH. Unless you want to hear the whole case at this time. In order to show that the union here is not the bargaining agent, that ballot would have to be counted. If you throw out this vote they have only 114 votes.

Trial Examiner BELLMAN. It seems to me if you had a ruling which would reduce the vote to 115 to 114, then the challenged ballot would be material. It is not a matter for us to try to determine at this hearing whether the challenged ballot should be opened. That is not a matter before the Trial Examiner.

Mr. ZACK. There is no challenged ballot here. There is no way of determining which ballot this Mrs. Kane cast, even though you were inclined to go into it.

Trial Examiner BELLMAN. I believe there is a challenged ballot which has been segregated. From the pleadings there seems to be no challenged ballot which would be material
90 in determining whether it was a tie election or one won by the union, if Mrs. Kane's vote were deducted from the vote received by the union. It seems to me that the question of how that challenged vote was cast certainly does not come before me at this time. If anybody has any contention to the contrary on that point, I would like to have it.

You want to show that at the time of the election Mrs. Kane was not an employee?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. And that she voted for the union or against?

Mr. MOCH. Voted for the union.

Trial Examiner BELLMAN. Do you propose to introduce Mrs. Kane?

Mr. MOCH. I do not expect we have to. She is in poor health, and, as far as we are concerned, we do not think we should ask her to come down here. If the Board wishes to subpoena her, the Board has that privilege.

Trial Examiner BELLMAN. Do you propose to indicate that the respondent has any substantial reason for believing that Mrs. Kane voted for the union?

Mr. MOCH. Oh, yes.

Trial Examiner BELLMAN. Are there any other matters that any of the parties want to place before the Trial Examiner for his consideration? I believe I have the general
91 problem before me shaped up as part of my ruling. If

there is anything you want me to consider on the general question, I would like to have it now.

Mr. HALLORAN. May I say one further word on the remaining issue before the Trial Examiner at the moment?

It appears from what counsel has said that the respondent is not contending that the finding of the Regional Director was either arbitrary or capricious. That being so, I submit that the evidence he proposes is clearly not admissible, because we are limited by the decision in the Sixth Circuit in the Capitol Greyhound case which, by inference at least, was approved by the United States Supreme Court when it denied certiorari.

If it is true—and I do not think it can be denied because it comes practically out of the mouth of my brother—that the company is not contending that the finding was arbitrary or capricious—the question of Mrs. Kane's vote is not before us today. The question is whether the Regional Director's conduct was arbitrary and capricious. If that is so, I see no necessity for going further with any evidence pertaining to the subject matter.

Trial Examiner BELLMAN. I want a little extra time this noon to study these issues and especially to study these stipulations and documents before me.

Is there anything else?

92 Mr. HALLORAN. In connection with the Automatic Products Company case cited by my brother, it is not in any sense in point on the question raised here today.

Trial Examiner BELLMAN. The hearing will be in recess until two o'clock.

(At 12:30 p. m. a recess was taken until 2 p. m.)

93 AFTER RECESS

(At 2 p. m. the hearing was resumed pursuant to the taking of recess.)

Trial Examiner BELLMAN. The hearing will be in order. During my rather careful study of the documents in evidence and the contentions of the parties, which I made during the lunch recess, one or two questions came to mind that I would like to get cleared up now.

There is reference in Board's Exhibits 2 and 3, to the objections to the election filed by the respondent on May 9, 1944. The objections themselves are not in evidence. Does anyone intend to produce the objections?

Mr. HALLORAN. The Board does not.

Trial Examiner BELLMAN. Apparently those objections were in the form of a letter. The letter is referred to in the Regional Director's report on objections. If the parties want to stipulate that the letter in substance contains what the Regional Director's

report on objections states that it contains, that might be one way of getting in evidence just how the objections were phrased, or you might put in the letter itself.

Mr. Moch. I have not two copies of the letter. I have one copy of the letter. If you will allow me to, I will furnish you with a copy.

Trial Examiner Bellman. Off the record.

94 (Discussion off the record.)

On the record.

I understand the document is available and copies are being made and you will introduce that as part of your evidence?

Mr. Moch. Correct.

Trial Examiner Bellman. The other matter refers to the eligibility of voters and to the pay roll of April 21, 1944, referred to in the consent election agreement. Was that the pay roll for the period ending April 21?

Mr. Halloran. That is correct.

Mr. Moch. Yes.

Trial Examiner Bellman. How long is the respondent's pay roll period?

Mr. Moch. One week.

Trial Examiner Bellman. Will the parties stipulate that the pay roll period is one week?

Mr. Halloran. The Board so stipulates.

Mr. Moch. All right. May I correct one statement that I made this morning. I referred to the pay roll period of April 15. April 21 is the period I meant.

Trial Examiner Bellman. This proviso would mean employees who appeared on the pay roll for one week before April 21 and ending April 21.

95 Off the record.

[Discussion off the record.]

On the record.

Does the fact that the pay roll date, April 21, 1944, was used, mean that the employees who appeared on the list of eligible voters were employed during the previous week?

Mr. Moch. No. During the week prior to the previous week. The week in which the employees worked would start April 7, 1944.

Trial Examiner Bellman. It is the practice to hold a week's pay?

Mr. Moch. Yes, sir.

Trial Examiner Bellman. Persons paid April 21 were paid on April 21 for the work they had performed two weeks previously and coming down to the week previous?

Mr. Moch. Yes, sir.

Trial Examiner BELLMAN. Is there any objection to that statement as to how the pay roll was made up? (No response.)

Those two questions are cleared up. The question which remains is one of ruling on the extent to which the respondent will go ahead with the type of evidence it wants to produce.

I have given this matter careful consideration and I will give you my ruling at this time in a general way, so that you can be guided accordingly.

96 In view of the contentions of the parties and because of certain language in some of the recent Board decisions, particularly in O. U. Hoffmann, Case No. 4–C–1375, decided in March of 1944, I am going to permit the respondent to go ahead with evidence as to Mrs. Kane's employment status at the time of the election, as to when it gained knowledge of that status and as to any information it may have as to how Mrs. Kane voted in the election.

I believe that includes all that you said you wanted to present evidence on. And I can specify one matter which you did not stress, namely, when the respondent gained knowledge of Kane's employment status.

Does that ruling embrace all that you intended to cover?

Mr. MOCH. Yes, sir.

Mr. HALLORAN. You will note our objection.

Trial Examiner BELLMAN. I want to keep the hearing to these issues and I am going to give the Board a standing objection and exception to the entire line. Likewise I am going to give the union a standing objection and exception to the entire lines developed through this evidence.

The witness will resume the stand.

JOHN J. ELBERY, the witness on the stand at the time of recess, resumed the stand and testified further as follows:

97 Direct examination (continued) by Mr. Moch:

Q. You have given us your name and your position?—A. Yes.

Q. Do you recall that the election was held on Friday, May 5, 1944?—A. Yes.

Q. And that no stitchers worked on the following Saturday or Sunday?—A. Yes.

Q. I think that is as far as any answers of yours were concerned? Is that right. A. I believe so.

Q. I ask you if any employee brought to your notice anything which he or she thought was out of line in the election?

Trial Examiner BELLMAN. Suppose you begin with Monday, May 8.

Q. This employee came to you?—A. Yes.

Q. You do not recall now who it was?—A. No, I don't.

Q. What was the nature of the communication or conversation you had?

Mr. HALLORAN. I object on the ground of hearsay.

Trial Examiner BELLMAN. I will hear the evidence first.

98 It may or may not have a bearing.

Mr. HALLORAN. My objection is based on the ground that the testimony sought to be elicited from the witness is hearsay. My objection at the moment is not as to the substance. The witness is asked as to what some unidentified person, not a party to this proceeding, told him.

Trial Examiner BELLMAN. Objection overruled.

A. This party came to me and objected to the vote of this Jennie Kane.

Q. Mrs. Kane was a stitcher?—A. That is right.

Trial Examiner BELLMAN. In other words, some employee whose name you cannot remember came to you and said she did not think Jennie Kane ought to vote?

The WITNESS. Yes, sir.

Trial Examiner BELLMAN. Is that all that this employee said?

The WITNESS. In effect that is just what she said.

Trial Examiner BELLMAN. The testimony may stand.

Q. Didn't you ask her why she thought Jennie Kane should not vote?

Mr. HALLORAN. I object on the ground that it is leading.

Q. Did you ask this employee as to the basis of her objection?—A. I did.

Mr. HALLORAN. I object to the question. If counsel de-

99 sires to testify he should take the stand.

Trial Examiner BELLMAN. Objection overruled.

Q. What is your answer?—A. I did ask her.

Q. What answer did you get?

Trial Examiner BELLMAN. Are you offering this as probative?

Mr. MOCH. Not at all.

Trial Examiner BELLMAN. Are you offering it on the question of whether Mrs. Kane was an employee or not?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. Merely on how the company became interested in the question?

Mr. MOCH. That is right.

Trial Examiner BELLMAN. I will admit it on that basis.

A. This employee stated that in her opinion Jennie Kane didn't work as an employee of the company.

Q. What was the last time Mrs. Kane actually worked in the plant?—A. March 24, 1944.

Q. As far as you know did she ever appear in the plant after that time until the date of the election?—A. No; she did not.

Q. Did you help to prepare the list of employees to be
100 given to the Board?—A. Yes.

Q. In connection with the election?—A. That is right.

Q. Mrs. Kane's name was on that?—A. Yes.

Q. Did you have to hurry considerably to get that list prepared by the time the Board wanted it to be presented to them?

Mr. HALLORAN. I object to the form of that question.

Trial Examiner BELLMAN. Make your questions nonleading, please.

Q. Mrs. Kane's name was on the list?—A. That is right.

Q. Was there any notation as to whether or not she actually worked?—A. I beg your pardon?

Q. Was there any notation on that list as to whether or not she actually worked during the period for which the list was made up?—A. No. She was simply marked as absent.

By Trial Examiner BELLMAN:

Q. Did you put any notation on this list beside Mrs. Kane's name and, if so, what notation did you put?—A. I wouldn't want to say right at the moment. I would have to refresh myself
101 by looking at the list [consulting paper].

Q. Have you refreshed your recollection?—A. Yes.

Q. Can you tell me what notation was put on the list?—A. The notation was that she was out sick.

By Mr. MOCH:

Q. Did the company have any reason to suppose that the facts were any different from that notation?—A. No.

Q. After this employee made the remark to you that she objected to Mrs. Kane's voting, did you or did you not investigate as to whether or not Mrs. Kane actually had quit?—A. I did.

Q. Could you tell us about that investigation?—A. Yes. I went down to the United States Employment Office on Beacon Street to ascertain if she had applied or put her name on file for another position.

Q. What did you find?—A. I found that she had.

Q. Do you know as of what date she put her name on file there?

Mr. ROEWER. The document is the best evidence, I suppose.

Mr. MOCH. It is pretty difficult to run around and get all those documents.

102 By Trial Examiner BELLMAN:

Q. Did you explain to the representative of the United States Employment Service who you were?—A. Yes.

Q. Were you talking to an official of the Employment Service?—

A. I do not know whether it was an official. It was somebody in that particular department in the office that had to do with that work.

Q. Do you know the name of the individual?—A. I do not, sir; no.

Q. Do you know whether or not that individual referred to any records?—A. Yes.

Q. You can state what information was given to you in that interview.—A. A slip was found. This form was found in the file, on which Mrs. Kane had noted the fact that she had left the employ of the A. J. Tower Company and had given her reason for leaving.

By Mr. Moch:

Q. State whether or not anybody informed you that Mrs. Kane had put her name on a list as available for work?—A. Yes.

103 Q. She had?—A. Yes.

Q. And as of what date?—A. Right at the moment I do not recall.

Q. Was it prior to May 5?—A. I am sorry. I cannot say definitely.

Q. You went down to the United States Employment Office on the following Monday?—A. I went down on Monday, May 8.

Q. You do not now recall whether your informant at that office told you whether Mrs. Kane had put her name down any time prior to that Monday?—A. I know it was before.

Q. Do you know whether she put it down before or after the election?—A. I know it was before the election.

Q. Did you find out anything further during your investigation beyond the fact that she had put her name down as available for work?—A. I don't know what you mean.

Q. Were you informed that Mrs. Kane applied for any unemployment compensation?—A. I understand that she did.

Q. You were so told?—A. Yes, sir.

Q. After receiving that information state whether or

104 not you went back to your office and determined whether or not you had received notice of that application?

Mr. Rohwer. I think counsel ought not to lead the witness.

Trial Examiner Bellman. Objection sustained.

Q. After finding out the information you have just told us, did you return to the plant?—A. I went back to the plant.

Q. Did you make an attempt to ascertain if the company had received any notice of this application?—A. I did. I went through the files and found the form.

Q. Is this a photostatic copy of the form?—A. Yes, sir.

(Thereupon the photostat above referred to was marked as "Respondent's Exhibit No. 1" for identification.)

Mr. Moch. I offer this as the respondent's first exhibit.

Trial Examiner Bellman. What date was it that you found this in your file [referring to Respondent's Exhibit 1 for identification]?

The Witness. After I came back from the United States Employment Office on May 8.

Trial Examiner Bellman. Is there any objection to this document which has been marked as "Respondent's Exhibit No. 1" for identification?

105 Mr. Moch. I intend to offer it.

Mr. Halloran. The Board has no objection to the receipt of the document in evidence so long as by not objecting to its admission the Board is not waiving any rights under the general objection to the entire line.

Trial Examiner Bellman. I assure you and I assure the union that you have a standing objection to all testimony and all documents put in on this matter, under the ruling I gave you orally.

If you make your objection specifically as to matters of admissibility and other things of that sort, you will not be waiving your position in any sense.

(To witness) Is this a type of document which you receive frequently?

The Witness. Yes.

Trial Examiner Bellman. It is a general form sent to the company whenever an employee fills it out?

The Witness. Yes.

Trial Examiner Bellman. The document is admitted in evidence as Respondent's Exhibit 1.

(The document heretofore marked as "Respondent's Exhibit No. 1" for identification was received in evidence.)

Is this the first document in point of chronology which you received pertaining to Jennie Kane [referring to Respondent's Exhibit 1]?

106 The Witness. Yes, sir.

By Mr. Moch:

Q. When does this document purport to have been mailed, Mr. Elbery?—A. It looks like May 1. It is rather faint.

(The original of which Respondent's Exhibit 1 is a photostat is shown to the witness.)

A. (Continuing.) May 1, 1944.

Trial Examiner Bellman. The witness was looking at a photostat and you showed him the original document. If there is any question as to the clarity of the date on the photostat let us have the original compared by counsel and have it stipulated in the record what the original document shows. That is the way to handle that.

Mr. ROEWER. My understanding is that they are mailed out the same day.

Trial Examiner BELLMAN. The fact of the matter is that the photostat is blurred while the original shows the date clearly. What does the original show as to the date of mailing?

Mr. HALLORAN. It appears to me to be May 1, 1944.

Mr. ROEWER. And to me.

Trial Examiner BELLMAN. That is the respondent's understanding, too?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. All right.

107 Q. On this copy what is given as the date of Mrs. Kane's separation from the company?

Trial Examiner BELLMAN. Is that clear on the face of the document?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. It does not have to be testified.

Mr. MOCH. No.

A. March, 1944.

Mr. MOCH. The date of separation of Mrs. Kane from the employ of the Tower Company is set forth as March of 1944; reason for separation, left, could not continue to do heavy work of carrying bundles which was part of her job.

Q. The first you knew of that notice was the Monday following the election?—A. When I found it in the file on that day.

Q. It had not come to your attention before?—A. No.

Trial Examiner BELLMAN. Was that also the first you knew of any such matter as her having left in March and having left because she could not continue to do heavy work?

The WITNESS. That was the first notice I had had.

Q. After discovering that did you pursue your investigation further?—A. Yes.

108 Q. What did you do?—A. Called at Mrs. Kane's home.

Q. With anybody or alone?—A. With an attorney.

Trial Examiner BELLMAN. May we have the name of the attorney?

The WITNESS. Mr. Hession. Mr. Hession and I visited Mrs. Kane at her home.

Q. The same day?—A. I believe it was the same day, and I asked her——

Mr. HALLORAN. I object, may it please the Trial Examiner, to any conversation between this witness and Mrs. Kane, who has not been produced here as a witness by the respondent. This is absolutely hearsay. It is presented here as hearsay evidence, and the Board is in the position of having no means whatsoever at the moment to combat such testimony.

If we are going through this hearing with the respondent presenting his evidence in the way of hearsay statements, first in the case of somebody whose name the factory superintendent does not remember, and secondly in the case of a woman that he visited in company with an attorney, I submit if we are going to go through the respondent's case in that way it certainly does not help the Board one iota in arriving at a correct solution of the prob-
109 lem presented. I am strenuously objecting to any conversation had with Mrs. Kane, who is not a party to this proceeding.

Mr. Moch. I will withdraw the question at this time.

Q. While you were visiting Mrs. Kane did she sign a statement?—A. She did.

Q. Was that statement in writing?—A. It was.

Q. Is that the statement [handing paper]?—A. That is the statement.

(Thereupon the document above referred to was marked as "Respondent's Exhibit No. 2" for identification.)

Q. Did Mrs. Kane sign it?—A. She signed it.

Q. In your presence?—A. Yes.

Q. And Mr Hession signed it in your presence as a witness?—A. That is right.

Q. Did Mrs. Kane read that statement before she signed it?—A. She did.

Q. Was it also read to her before she signed it?—A. It was.

Mr. Moch. I offer the statement.

Mr. Halloran. I object.

Mr. Roewer. I object.

110 Mr. Moch. I offer Respondent's Exhibit No. 2 for identification.

Trial Examiner Bellman. This appears to be the statement quoted in part by the Regional Director. I overrule the objection and will admit the document as Respondent's Exhibit No. 2.

(The document heretofore marked as "Respondent's Exhibit No. 2" for identification was received in evidence.)

Mr. Moch. The statement is dated May 8, 1944——

Trial Examiner Bellman. Do not attempt to read into the record everything that you introduce as a document.

Mr. Moch. I want to read certain portions of it.

Trial Examiner Bellman. It is in evidence. If there is any part of it that you want to cite in your brief you may do so; and in oral argument, if you want to read part of it you may do so. You do not put documents in and proceed to stand here and read them. This is in evidence.

Mr. Halloran. The Trial Examiner understands, I assume, the

ground of the objection made by the Board, that here is a statement presumably signed by a person not a party to these proceedings. The Board has no opportunity to cross-examine her with respect to the subject matter of the statement, how it was prepared, whether the statement contains all that she told those persons, whether she did in fact say the things contained
111 in the statement, whether it was actually read to her, or whether she read it. In other words, the Board is put in the position of having evidence offered at this hearing which, so far as the Board is concerned, it is not able to contradict through the person herself.

They could produce 50 or 60 statements of that nature, and if they were all in evidence they would be proving the whole thing by hearsay evidence.

As far as I know, the person who purported to give the statement is available and could be produced here today and the statement could be put in properly through that witness.

Mr. ROEWER. There is another basis of objection. I question the right under the Act of the employer in this case to inquire from anyone that he said was eligible to vote, as to how that person voted.

Trial Examiner BELLMAN. It is clear that this matter has been considered in part at least by the Regional Director. I will let the ruling stand.

Mr. ROEWER. May I see the statement?

Trial Examiner BELLMAN. Surely. It is in evidence. Here it is [handing paper].

I will vacate my ruling admitting it, if you want to make an objection based on the fact that you have not seen it. It was here and I thought everybody had ample opportunity to examine the statement. When anything is offered everybody has a right to look at it.

112 Mr. ROEWER. Documents of this sort are usually offered by counsel who first offer them to counsel on the other side. It was given to the Trial Examiner and then offered by counsel for the respondent.

Trial Examiner BELLMAN. What do you mean?

Mr. ROEWER. Ordinarily when counsel introduces a document it is submitted to counsel on the other side before it is admitted.

Trial Examiner BELLMAN. You think that respondent's counsel was in error in not handing it to you before he had it identified?

Mr. ROEWER. That is right.

Trial Examiner BELLMAN. You have it before you now.

After this, documents will be identified first and marked for identification, and all parties will have due opportunity to ex-

amine them carefully. Then I will ask you if you have had ample opportunity to examine the document.

Has counsel for the union had ample opportunity to examine the document which has been marked as Respondent's Exhibit 2 for identification?

Mr. ROEWER. Yes, sir.

Trial Examiner BELLMAN. Has counsel for the Board had ample opportunity to examine Respondent's Exhibit 2 for identification?

Mr. HALLORAN. Yes, sir.

113 Trial Examiner BELLMAN. Any objection?

Mr. ROEWER. I do object.

Trial Examiner BELLMAN. Is there anything further?

Mr. HALLORAN. Just the original objection.

Trial Examiner BELLMAN. The objection is overruled and the document is admitted as Respondent's Exhibit 2.

(The document heretofore marked as "Respondent's Exhibit 2" and received in evidence was readmitted.)

By Mr. MOCH:

Q. Will you explain to the Trial Examiner, Mr. Elbery, the type of work which Mrs. Kane did prior to March, 1944?

Mr. ROEWER. I object.

Mr. HALLORAN. I object on the ground that it is immaterial to the issues involved in this case.

Trial Examiner BELLMAN. In what way might it have a bearing?

Mr. MOCH. On the basis of the evidence which is already in it shows that Mrs. Kane was not capable of being employed at the respondent's plant, that she was not capable of working. I will endeavor to show the type of work she was doing and I will ask Mr. Elbery whether she could do any easier work.

Trial Examiner BELLMAN. What has that to do with whether or not she actually quit?

Mr. MOCH. In the notice from the Division of Unemploy-
114 ment Security the reason given was that she left, could not continue to do heavy work of carrying bundles, which was part of her job. We want to show if she could not do that she could not do anything.

Mr. HALLORAN. That does not follow.

Trial Examiner BELLMAN. It may or may not. I will let the evidence in.

A. Mrs. Kane was a stitcher.

Q. Give us a brief idea of what a stitcher does.—A. Well, she gets bundles in amounts of twenty garments at a time, does her portion or her part of the making of the garments and returns them to the table, which may be some little distance from her particular machine.

Q. Was there any lighter work in the plant which Mrs. Kane could do?

Mr. HALLORAN. I pray your Honor's judgment. Is this man competent to give an opinion as to whether this woman can or cannot perform certain types of work? I object.

Trial Examiner BELLMAN. Did she ever ask you for lighter work?

The WITNESS. No, sir.

Trial Examiner BELLMAN. How does it become in issue?

Mr. MOCH. There wasn't any to be had, anyway.

By Trial Examiner BELLMAN:

Q. She never indicated to you at any time before you
115 found this slip (Respondent's Exhibit 1) in your file, that she found the work she was doing to be too hard or asked for lighter work?—A. That is correct.

Q. The first you learned of her feeling that the work was too heavy was when you found this document on May 8?—A. That is correct.

By Mr. MOCH:

Q. State whether or not, to the best of your knowledge, Mrs. Kane appeared at the plant from March 24 to May 5?—A. Not to my knowledge.

Q. State whether or not, to the best of your knowledge, she has appeared since?—A. Yes.

Q. When?—A. Approximately three or four weeks ago.

Q. For what purpose?—A. She came in and asked for a release.

Q. What reply did she receive?—A. I told her I did not think she required a release.

Mr. MOCH. You may inquire.

Cross-examination by Mr. HALLORAN:

Q. You prepared the list that was furnished to the Board and which was subsequently used as the check list at the voting?—A. I helped to do that.

116 Q. Who else helped you?—A. A clerk in my office.

Q. He was operating under your supervision?—A. A young lady.

Q. She was operating under your supervision?—A. Yes.

Q. Where did you get the information that caused you or caused that clerk to write the words "Out sick" after the name of Mrs. Kane on the eligibility list?—A. I don't believe I could answer that question myself.

Q. But you did get the information?—A. Yes.

Q. That she was out sick?—A. Yes.

Q. Have you a Miss Stone in your office?—A. We have a Miss

Stone. She is not in the office. She is in the plant. She is a forelady.

Q. At some time did Miss Stone, the forelady, communicate with you or communicate with the office relative to Mrs. Kane's absence from work?—A. May I get that question again?

Mr. HALLORAN. Read the question.

(The question is read as above recorded.)

Mr. MOCH. You mean while she was out of the plant?

Q. (Continuing.) After March, when she ceased working.

117 Mr. MOCH. Up to the time of the election?

Mr. HALLORAN. Yes.

A. Mrs. Kane sent a note addressed to Miss Stone, asking that her pay be given to another operator, and that was the pay of that last week that she was there. That is a rule of our company, that the only time we will give anybody any pay for another employee is when a written note is sent by the employee whose money it is.

Q. Miss Stone, I assume, turned that note over to you?—A. Not to me, sir.

Q. To whom did she turn it over?—A. That went to the cashier.

Q. Did you receive the note yourself?—A. I didn't see the note myself.

Q. Is that note available?—A. I don't know.

Mr. MOCH. Here it is [handing paper].

Mr. HALLORAN. Can it be agreed that this is a note that was given to Miss Stone and subsequently turned into the office?

Mr. MOCH. Ask the witness.

The WITNESS. I will agree to it.

Mr. HALLORAN. The witness said he had not seen it.

Mr. MOCH. I do not believe he said he had not seen it.

Trial Examiner BELLMAN. Just give it to the witness and

118 ask him whether he can identify that note.

(Thereupon the document above referred to was marked as "Board's Exhibit No. 5" for identification.)

The WITNESS. I can; yes.

Trial Examiner BELLMAN. What is it?

The WITNESS. It is the note that Mrs. Kane wrote to our Miss Stone.

Trial Examiner BELLMAN. The note that you just testified about?

The WITNESS. Yes.

Trial Examiner BELLMAN. Off the record.

(Discussion off the record.)

On the record.

By Mr. HALLORAN:

Q. Can you give us the date, if you know, when this note came from Mrs. Kane?—A. I can't give you the date. I can simply

say that it had to do with the money on the pay day about the last of March.

Mr. HALLORAN. I offer in evidence the document previously marked as "Board's Exhibit No. 5" for identification, being the note testified to by the witness from Mrs. Jennie Kane to Miss Stone.

Trial Examiner BELLMAN. Any objection? (No. objection.)

There being no objection the document is admitted in evidence as Board's Exhibit 5.

119 (The document heretofore marked as "Board's Exhibit No. 5" for identification was received in evidence.)

By Trial Examiner BELLMAN:

Q. Is this the last communication of this type that you received from Mrs. Kane, concerning pay [referring to Board's Exhibit 5]?—A. That is right.

Q. Your pay practice is to hold back a week?—A. Yes.

Q. What day was Mrs. Kane last paid for?—A. March 24, the last day she worked.

Q. And she was paid a week or so after that?—A. It was the Friday of the next week. Friday is pay day.

Q. It would be Friday?—A. Friday of the week after March 24.

Q. It would be the Friday after the Friday of the week in which March 24 fell, wouldn't it?—A. I don't know just what day of the week March 24 fell on.

Q. We have a calendar, and perhaps we can get that cleared up [consulting calendar]. March 24 was on Friday.

A. It was the following Friday.

Q. It would be the 31st of March?—A. That is right.

Q. Did you receive any other communication of any kind, in writing or orally, from Mrs. Kane between the time this
120 letter was received and the day of the election?—A. No; not at all.

Mr. HALLORAN. Respondent's Exhibit 1 indicates that notice of the filing of the claim by Mrs. Kane was mailed to the company on May 1, 1944. Will you agree that the company received the notice on May 2, 1944?

The WITNESS. I cannot agree to that, sir. I did not see it.

Trial Examiner BELLMAN. How far is the company's plant from Boston?

The WITNESS. A very short distance. It should be overnight, as a matter of fact.

Mr. HALLORAN. It is part of Boston itself.

Trial Examiner BELLMAN. It is located where?

The WITNESS. Roxbury, a suburb of Boston, probably not more than three or four miles from downtown Boston.

Trial Examiner BELLMAN. In the normal course of your busi-

ness, if you were counting on receiving or sending communications through the United States mail, would you consider 24 hours a reasonable period of time in which to get delivery?

The WITNESS. Yes; I would.

By Mr. HALLORAN:

Q. So that, assuming that the mails functioned in the usual manner, your company would have received this notice of
121 claim filed by Jennie Kane on May 2, 1944?

Mr. MOCH. Objection.

Trial Examiner BELLMAN. Overruled.

Mr. MOCH. Can't we have another assumption?

Trial Examiner BELLMAN. Read the question.

(The question is read as above recorded.)

Mr. MOCH. Could we add the assumption that it was mailed on May 1?

Trial Examiner BELLMAN. The original official document is stamped "Notice mailed May 1, 1944." You have the assumption that the document was mailed on the day that it was stamped as mailed.

(To witness.) Assuming the document was mailed on May 1, as it is stamped as having been mailed, in the normal course of the delivery of mails in and about this vicinity, would this normally be received by you on the second?

The WITNESS. Providing the second was not on Saturday.

Mr. MOCH. It was not. It was on Tuesday.

The WITNESS. It should be the next day otherwise.

Trial Examiner BELLMAN. Here is a calendar (handing calendar). May 2 appears to be Tuesday.

The WITNESS. That is right.

By Mr. HALLORAN:

Q. I think you testified that your company frequently
122 receives notices of claims filed?—A. Occasionally, yes.

Q. What is the usual procedure when the company receives one of those notices?—A. We file them, if we have no objection.

Q. Who sees the notice first?—A. Well, they are opened by a mail clerk and they are then left on my desk for perusual. From there they are filed.

Q. So that when they are received and the mail clerk has sorted them out along with the other mail that he receives, they are placed on your desk?—A. Yes.

Q. On the desk of the factory superintendent?—A. Yes.

Q. So that assuming that this notice was received on Tuesday, May 2, it was placed on your desk on Tuesday, May 2?—A. I can't answer, because I never saw it until I looked for it.

Q. Have you ever known of any instance before when a letter or report which was to go to you and was received at your plant on a certain day, was not placed on your desk on that day?—A. I cannot answer that.

123 Q. Have you ever known of any situation before in which one of these notices of claim was not placed on your desk the day that it was received?—A. I am not at all sure that I have not missed others.

Q. It is a fact, Mr. Elbery, that in the ordinary course of events this notice of claim would be on your desk the day it was received?—A. Yes.

Q. Are you on the job there every day?—A. Yes.

Q. You were on the job every day during this period?—A. Yes.

Q. There wasn't anybody filling in for a day or two or anything?—A. No.

Q. You will notice it says in this notice of claim, "If you know of any misrepresentation or other reason why payment of benefits should not be made to this claimant, you must, under the law, complete this form and return it to the office location shown above within seven days from the date appearing in the notice of mailing." Did you send any communication to the Federal Security Agency that sent out this notice, relative to this woman?—A. No.

Q. Is it not a fact that if conditions warrant, you immediately notify Federal Security as to the reasons why compensation
124 should not be paid to the claimant?—A. We do.

Q. Didn't you have within your knowledge at that time certain information relative to Mrs. Kane?—A. I didn't see the form. I had no occasion to do anything about it.

Q. Will you agree with me that the form was received?—A. It was in the file when I looked for it that Monday. It must have been received.

Trial Examiner BELLMAN. Did you send out any objection on Monday, May 8?

The WITNESS. No, sir.

Trial Examier BELLMAN. That would be within the seven days, wouldn't it?

The WITNESS. Yes.

By Mr. HALLORAN:

Q. Have you sent out any objection up to the present day?—A. No, sir.

Q. Is Mrs. Kane working for the company now?—A. No, sir.

Q. Are you sure of that?—A. The last day she worked for the company was March 24.

Q. Would you know whether or not she had returned to work for the company?—A. Yes.

Q. Has Mrs. Kane been terminated on the rolls of the com-

125 pany up to the present day, Mrs. Elbery?—A. Her name is off our list.

Q. When was it taken off?—A. I have no definite date of that. I can check it.

Q. Within the past week?—A. No; before that. Several weeks ago.

Q. Was it taken off before May 8 or after May 8?—A. It was after May 8. That is the first we knew she got through.

Q. How long after May 8?—A. I wouldn't know the exact date.

Q. Was it a matter of days or weeks?—A. I would want to check before I could make an honest answer to that question.

Q. Why did you tell Mrs. Kane that she did not need any release from your company?—A. Because she told me she had gone down and applied for unemployment compensation, it is my opinion she did not need a release.

Q. When did she tell you?—A. On a Tuesday, about three or four weeks ago when she came to the plant.

Q. You mean that she has visited the plant since the election?—A. Oh, yes; about a month, or three or four weeks ago, as
126 near as I can judge.

Q. It was not during your conversation with her at her home on May 8, that she asked you about the release, was it?—A. No. This was just within a month.

Q. In that conversation of some weeks ago, at the plant, did she indicate to you that she planned to return to work when she was able?—A. No.

Q. Did you ask her when she was going to return to work?—A. No.

Q. What else did you talk about at the conference with Mrs. Kane, at which was present Attorney Hession and at which a signed statement by Mrs. Kane was procured? Besides what is in that statement, what else was talked about?

Mr. Moch. Objected to for the same reason that the attorney for the Board objected when I attempted to ask a similar question.

Trial Examiner Bellman. I will overrule the objection.

A. What else did we talk about?

Q. Yes.—A. It was mostly a matter of questioning Mrs. Kane as to her status with the company. Attorney Hession asked her several questions which are embodied in the statement. He got her answers orally and then wrote them down.

Q. Do you mean that everything she said in answer to
127 questions by Attorney Hession is included in this statement that was signed?—A. I wouldn't say everything was; no, sir.

Q. I want you to look at that statement and tell the Trial Examiner anything that was talked about there that is not in the statement.—A. I can't think of anything other than what is covered.

Q. How long were you talking to Mrs. Kane?—A. Why, we might have been there 20 minutes or 25 minutes.

Q. During that period I assume Mr. Hession was asking her numerous questions?—A. Yes. As a matter of fact, we carried on a little conversation about her family—I did, with her.

Q. Did she tell you or Mr. Hession at that time that she had been told by some of her fellow workers that the only way she could get compensation was to say that she had left the employ of the company?—A. I do not recall that.

Q. You do not recall that?—A. No.

Q. You think it may have been said by her?—A. Possibly.

Q. I notice in the statement appears this language: "I voted for the union at the election on last Friday." Who asked
128 her that question?—A. Mr. Hession.

Q. He asked her for whom she voted?—A. That is right.

Q. And she answered that she voted for the union?—A. That is right.

Q. Did Mr. Hession also ask her if she had been driven to the polling place in a union automobile?—A. I don't recall that.

Q. Did she admit at any time that she did not intend to return to the employ of the Tower Company?—A. No; she didn't definitely say that she was not going to return.

Q. As a matter of fact, she said she was going to return to the company?—A. No, sir.

Q. When she felt better?—A. No, sir.

Q. Didn't she say in her statement, "I haven't worked since leaving the Tower Company, because of my physical condition"?—A. Yes.

Q. You mean to say she didn't go further and say that when she was able to return she was going to return?—A. In the talk I had with Mrs. Kane that day she gave me the impression that she never expected to return to work again because of her physical condition.

129 Mr. Roewer. I ask that the answer be stricken as not responsive.

Trial Examiner Bellman. Read the question, and the answer.

(The question and answer are read as above recorded.)

I will overrule the objection and will let the answer stand.

Do you mean by that that she gave you the impression that her physical condition was so bad that she did not know whether she would ever be able to come back to work?

The Witness. Yes, sir.

Trial Examiner BELLMAN. Did you make the remark that "You are off our pay roll" or "We hope you will come back when you are able"?

The WITNESS. I didn't make any comment.

Trial Examiner BELLMAN. You did not tell her that because of her physical condition she was through?

The WITNESS. No.

By Mr. HALLORAN:

Q. You did not tell her on that day, as I understand, that she was through as an employee of the Tower Company?—A. Not at that visit; no.

Q. At any time did you tell her that she was through?—A. I told her three or four weeks ago, when she came in, that she was no longer on our rolls as an employee, that we considered her as off our pay roll.

130 Q. Were you present at the scene of the balloting on election day before the polls opened?—A. Not in the room where the balloting was; no, sir.

Q. You did furnish two company observers for the company balloting?—A. Yes.

Q. And an attorney was there?—A. Yes.

Q. Which attorney was that?—A. Mr. Noonan.

Q. He was present up to the time that the balloting started?—A. I believe he was.

Q. Were you there after the polls closed?—A. I was through the plant all day.

Q. Were you there when the ballots were counted?—A. No; I wasn't in the room at any time that day.

Q. Was the attorney present?—A. Yes.

Q. Do you know whether or not it was a fact that before the observers signed any papers relative to the election they got permission from Mr. Noonan to do so?—A. No; I do not know that.

Trial Examiner BELLMAN. The respondent is not in any way challenging the regularity of the election or the way it

131 was conducted?

Mr. MOCH. No.

Trial Examiner BELLMAN. You were given full opportunity to challenge the voters, as I understand your position, but you did not challenge this one on that day for the reasons that you stated?

Mr. MOCH. That is right; yes, sir.

Q. Were the two persons whom you designated as observers for the company pay-roll clerks?—A. One was a factory office clerk, a young lady; and another, a gentleman, was a clerk in the main office.

Q. What was the name of the factory office clerk?—A. Miss Helen Considine.

Q. Does she handle the time cards or the time records of the employees of the factory?—A. No. That is, she handles them in part. Do you mean, does she make up the pay roll?

Q. Yes.—A. No.

Q. Does she keep a record of those who are not working on certain days?—A. She only gets those records—may I explain this a little bit?

Q. Yes.—A. She gets the pay-roll slips after they are
132 made out and notes the number of hours that each employee works for that pay roll period, on individual cards. Each operator has an individual card about this size [indicating], on which we put down all the pertinent information about their earnings, hours worked, average hourly rates, and so forth. The only reason Miss Considine gets that is so that she can fill in that information from week to week on these cards.

Q. Does she have available a list of all employees in the factory?—A. Her only list would be through the cards that she has.

Q. So that she would know, in the ordinary course of events, if an employee, such as a stitcher, was out of work an unreasonable length of time?—A. That is correct.

Q. And as of May 4 or May 5, the day of the election, Mrs. Kane had been out of work about six weeks, hadn't she?—A. Yes.

Q. I assume it is part of the duties of the factory office clerk to call to the attention of the office any unreasonable or unusual absences of employees from work?—A. Not particularly. We have had employees out for months that we knew were definitely ill.

Q. It was within this clerk's knowledge that that employee was out for a very long period of time?—A. Yes.

133 Q. As far as you know, neither the office nor you were notified of this lengthy absence of Mrs. Kane?—A. It was not pointed out in more than probably half a dozen other cases at the same time.

Q. Mr. Kissick was also an observer for the company?—A. Yes, sir.

Q. What does he do?—A. He is an office clerk. He has nothing to do with pay rolls.

Q. Or with any of the factory employees?—A. No.

Q. I want you to think hard and see if you cannot recollect the name of that employee who told you on Monday, May 8, that she objected to the fact that Mrs. Kane had voted.—A. I can't think of her name.

Q. Do you know in what department she worked?—A. She was a stitcher.

Q. Did she come to you in the morning or in the afternoon?—A. I believe it was early Monday morning.

Q. And the election had been held when?—A. Friday.

Q. The previous Friday?—A. That is right.

134 Q. Were the stitchers working on Saturday?—A. No.

Q. Do you recall when the polls closed on Friday?—A. I am not certain. I believe it was either 2:30 or 3:30.

Q. Was this girl, who you say gave you this information, working on Friday afternoon?—A. I am not sure. I don't know.

Q. Didn't you think it was important to make some notation of the name of the person who sent you on your elusive investigation?—A. No; at the time I didn't.

Q. How did it happen that you headed for the United States Employment Service as your first step?—A. It just occurred to me that if it was so, as this person supposed, that this woman had probably gotten another job and was working some place else, I felt that there would be some record down there because, after all, she would have to get a certificate of availability either from us or from the United States Employment Service. If she was found to be working in another job, that is what I was thinking about, how could she get another job without a certificate of availability.

By Trial Examiner BELLMAN:

Q. Did you come into Boston immediately?—A. I did, sir, and went in to the United States Employment Service, on

135 Monday, to ascertain if she had got a certificate of availability.

Q. This woman whom you cannot identify said she thought Mrs. Kane was working somewhere else?—A. That is the story.

By Mr. HALLORAN:

Q. As the result of your investigation did you find that Mrs. Kane was working anywhere else?—A. No; she was not.

Q. Isn't it a fact that up to the present day Mrs. Kane has not worked anywhere else?—A. I couldn't say that.

Q. So far as you know, she has not worked for anybody else?—A. So far as I know, she has not.

Q. Just to get a point clear in my mind, you say about three or four weeks ago Mrs. Kane went to the plant and talked with you?—A. That is right.

Q. And she said something about a release?—A. She asked for a release.

Q. And you said, "You don't need any because you are not on our pay roll"?

A. I told her I didn't think she required a release, not because she was not on our pay roll but because she mentioned that she had gone down to get some unemployment compensation.

Trial Examiner BELLMAN. Does one have to have a
136 release in order to get unemployment compensation?

The WITNESS. Not according to my understanding of it.

Trial Examiner BELLMAN. When and why does one get this release?

The WITNESS. That is the certificate of availability that one must get from a plant doing important work, to get a job any other place.

By Mr. HALLORAN:

Q. At that time was anything said by her as to why she had filed for compensation?—A. She told me she was still feeling ill.

Q. She didn't feel able to work?—A. She didn't say that. She said she was still feeling kind of mean.

By Trial Examiner BELLMAN:

Q. If she was trying to get another job she would have to get a certificate of availability?—A. Either from us or the United States Employment Service.

Q. If she was just trying to get compensation she wouldn't need a certificate of availability?—A. She wouldn't require availability.

Q. Can she get unemployment compensation if she is just sick?—A. I wouldn't want to be sure in answering that.

Q. Under your set-up do your employees get sick benefits from the same agency which sends this notice which is marked
137 as "Respondent's Exhibit 1"?—A. I wouldn't want to answer that, sir, whether it is through the Unemployment Compensation or the Social Security that a sick person would be aided. I think Unemployment Compensation has to do only with helping people to get them another job.

Q. What sick benefits are employees in your plant able to get?—A. You mean through the State or the Government?

Q. From any source?—A. I am not very well versed on that. I wouldn't want to answer.

Q. Does an employee in your plant have any protection whatsoever against an illness which would keep him out of work for a while, other than he might be supplying himself with a form of private insurance?—A. I would like to be able to give you a definite answer on that. I could only guess.

Q. Does the company contribute to any kind of a fund?—A. No.

Q. Does it have any kind of group insurance?—A. No.

Q. There was nothing that the company was contributing to in any way which Mrs. Kane had been or would have been
138 receiving in the form of sickness compensation?—A. No.

Q. Or disability compensation?—A. No.

Q. When you referred to your having to fill out certain parts

of Respondent's Exhibit 1, if you had objection, what did you mean by using the word "objection" there?—A. What is that question in connection with?

Q. In connection with Respondent's Exhibit No. 1, you said, I think, that you put this kind of a document in the file if you did not have any objection.—A. There are certain stipulations here that are in small type [indicating].

Q. Will you indicate what you mean by the matters in small type?—A. About half way down you will read "Payment of benefits to the individual named above may be affected by any one of the following reasons."

Q. If any of those reasons are controlling you are supposed to indicate that and send the form back to the Commission?—A. That is correct. For instance, there is one here that says "suitable work now available." If a party had gone in and said they were laid off because of no work, obviously we would object to it on the ground that there was work for them.

139 Q. What does the process consist of, of taking anyone's name off your list?—A. It is simply a matter of taking their card and placing it in another box among the cards of those who have left our employ.

Q. Do you notify any agencies at all that you are no longer paying contributions or taxes on such employees?—A. No, sir.

Q. Do you fill in any regular forms to send to any agencies, indicating that persons have been so separated?—A. Yes.

Q. To whom do you send such forms?—A. I send one each month to the United States Employment here in Boston, and I believe our cashier in the main office sends one to the Department of Labor.

Q. Can you give me the date or dates upon which those forms were sent?—A. I can't, sir.

Q. Can you give me the approximate date?—A. Well, about two weeks ago would bring it to, say, the middle of the month. That was the last of the local or the United States Employment records that were sent out.

On what date our cashier sends one to the Department of Labor, I have no means of knowing.

Those forms—if I may add a little to that—ask the num-

140 ber of "hires," "fires," "quits," and so forth, for the month.

Q. Do you know approximately what date was given as the date of the separation of this employee, Mrs. Kane, in making those reports?—A. No.

Trial Examiner BELLMAN. Are there any further questions of this witness?

Mr. ROEWER. I have one or two questions.

Cross-examination by Mr. ROEWER:

Q. How long had Mrs. Kane been in the employ of the company?—A. The nearest I would want to come to that is to say that she was there probably something over a year.

Q. Something over a year?—A. Something over a year.

Q. As a stitcher she sits at a power-driven machine, does she not?—A. Yes, sir.

Q. Her principal function as a stitcher is the feeding of the garment into the sewing machine, which is power driven?—A. That is right.

Q. You said she had to carry a package or load of 20 coats?—A. Twenty garments. She was working on aprons most of the time.

141 Q. She was most of the time on aprons?—A. Yes.

Q. What would be the weight of this bundle of 20 aprons or 20 coats?—A. Not much.

Trial Examiner BELLMAN. Give us the approximate weight.

The WITNESS. Why, I would say if they weighed five pounds they would weigh a lot.

Q. As a matter of fact, her job had very little lifting in it, as far as weight is concerned?—A. Not too much.

Q. Is that right?—A. That is right.

Q. During the year that she worked there you had no complaint from her about the lifting part of it?—A. Not that ever came to my attention.

Q. Doesn't the A. J. Tower Company provide floor boys or girls to take the work away when the stitcher has finished the work?—A. Yes.

Q. Didn't you have such employees, as a matter of fact, in the plant when Mrs. Kane worked there?—A. Not the last few months that she was there. She worked in a small unit on the third floor. Our large main unit is on the fourth floor. We found it practically impossible to get help to take over the

142 carrying duties. The result is what carriers we had were kept where the main group or large group of stitchers were.

Q. You say that this group of coats or aprons would not exceed five pounds in weight?—A. I would say so.

Q. How far would this bundle have to be carried by Mrs. Kane, wherever she had to take it?—A. Probably as far as from here to that wall there [indicating 12 to 15 feet].

Q. Less than 12 to 15 feet?—A. Yes.

Q. Do you recall being present at the hearing on the objections to the certification, before Dr. Myers, when Mr. Noonan was present?—A. Yes.

Q. It was something more than just a conference, wasn't it?—[No response.]

Q. You testified, didn't you?—A. I did.

Q. In other words, when Mr. Noonan was handling his case, he put you on the stand as a witness; isn't that right?

Mr. Moch. Just a moment. I object to this line of questioning. The record speaks for itself. The report is in there. If counsel wants to ask Mr. Elbery any questions of fact he is entitled to do so.

143 What is the purpose of this?

Mr. Roewer. Up to this point the conferences or hearings before Dr. Myers have been referred to as conferences. I want to bring out that this was not a conference exclusively, but a hearing.

Trial Examiner Bellman. I don't care what they were called or how they were called. They could not have been formal hearings in the sense that this is a formal hearing. I do not think anyone contends that.

Mr. Roewer. I do not contend that they were formal hearings. I want to contend that the respondent in this case was heard at length, with witnesses.

Trial Examiner Bellman. Nobody questions that. I think the respondent has conceded that it is making no contention that it was not fully heard.

Mr. Moch. That is right.

Trial Examiner Bellman. Everything that you wanted to put on you were given an opportunity to put on? Is that correct?

Mr. Moch. Absolutely.

Trial Examiner Bellman. I thought it was conceded. There is no need of covering material that is conceded.

Mr. Roewer. I had in mind the language of the courts in other cases. I have no further questions.

144 Mr. Halloran. I have no further questions.

Trial Examiner Bellman. Do you have anything further, Mr. Moch?

Mr. Moch. No.

By Trial Examiner Bellman:

Q. What is the usual policy of your company with reference to employees who are sick?—A. If we have an old and loyal employee we will aid them, one who has been with us for some time. We have no general policy of aid.

Q. I do not mean in terms of giving them assistance. I mean in terms of severing them from the pay roll.—A. We have no time limit. We have never set a time limit as to how long an employee might be out ill before we would separate him from our pay roll.

Q. Employees have been ill for periods of months and have re-

mained on the pay roll?—A. Months. In some cases a good many months.

Q. When was the first time you informed Mrs. Kane that she was not on your pay roll?—A. The first time I informed her of that was about a month ago. That was the first occasion I had to see her since back in May.

Cross-examination by Mr. HALLORAN:

Q. That would be about July 3?—A. You mean the last time she was in the office?

145 Q. When you informed her she was no longer on the pay roll?—A. I would say three or four weeks, as a guess.

Q. It might have been three weeks?—A. It may have been three.

By Trial Examiner BELLMAN:

Q. Have you ever mailed her anything in writing indicating that?—A. No, sir.

Q. How did the matter come up when you informed her that she was off the pay roll? Just what did you say?—A. As I say, she came in and wanted to know if she could get a release, and she further stated that she was trying to get unemployment compensation. I told her that I did not believe that she needed a release for that purpose. She then said, "Well, possibly I have applied for the wrong thing." She said, "I think I will go down and see about getting Social Security benefits." It was at that point that I told her that as far as our records showed, she was not on our list as an employee.

Q. Did she say anything at all in that interview about wanting to get a job at another plant?—A. No; she didn't mention it.

Q. Did she say anything at all about wanting to work at your plant?—A. She asked me if we had some light work and I said "No; we have no light work, nothing lighter than what you have done."

146 Trial Examiner BELLMAN. Are there any other questions?

Mr. MOCH. I have two.

Redirect examination by Mr. MOCH:

Q. Do you ever indicate severance of employment by a written notice to employees?—A. No; we make no practice of that.

Q. Did this notice from the Division of Employment Security ever come to your attention prior to Monday, May 8, 1944?—A. No.

Q. It was simply filed without your ever having seen it?

Mr. ROEWER. I object to that. It is immaterial.

Trial Examiner BELLMAN. Overruled.

A. Yes.

Q. Did you ever make any objection in regard to this notice?—A. Of her work!

Q. Yes.—A. No.

Q. Do you think you should?

Mr. ROEWER. I object.

Trial Examiner BELLMAN. Does he think now that he should have made it?

Q. Do you think you should have made an objection as
147 soon as it did come to your attention?—A. No; because, after all, she said that she had left.

Mr. MOCH. No further questions.

Mr. HALLORAN. No further questions.

Mr. ROEWER. I have no questions.

Trial Examiner BELLMAN. The witness is excused.

(Witness excused.)

Mr. HALLORAN. I have copies of the letter of May 9, 1944, sent to the Board by the Company's attorney, setting forth the objection to the election. I understand that counsel for the company and counsel for the union have no objection to its being admitted in evidence.

Mr. MOCH. No objection.

Trial Examiner BELLMAN. Do you want it to be identified in the record as a Respondent's Exhibit or as a Board Exhibit?

Mr. MOCH. It is perfectly immaterial.

Mr. HALLORAN. I offer it as Board's Exhibit No. 6.

(Thereupon the document above referred to was marked as "Board's Exhibit No. 6" for identification.)

Trial Examiner BELLMAN. Is there any objection to its being received in evidence?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. Has everybody had every opportunity to examine it?

I will admit it in evidence as Board's Exhibit 6.

148 (The document heretofore marked as "Board's Exhibit No. 6" for identification was received in evidence.)

The hearing will be in recess for five minutes.

(Short recess, following which the hearing was resumed.)

The hearing will be in order.

FREDERICK A. NEWMAN, a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MOCH:

Q. Your name, please?—A. Frederick A. Newman.

Q. Your position with the company?—A. General manager.

Q. Were you present at the hearing in the office of the Regional Director, at which the consent agreement was arranged?—A. Yes.

Q. And a list of your employees in the unit was requested of you?—A. Yes.

Q. How much time did they give you to prepare that list?

Mr. HALLORAN. I suppose that is a matter that is set forth in the document before the Trial Examiner. The election date is set forth and the date of the agreement is set forth.

149 Mr. MOCH. The date of the hearing is not fixed.

Trial Examiner BELLMAN. Are you making any contention that if you had more time you would have found out, by some process or other, that Mrs. Kane was not an employee?

Mr. MOCH. I don't think we would have. The only contention we are going to make is that we did not have that opportunity, and we do not know what would have happened.

Mr. ROEWER. I object. I do not see that it is material at all.

Trial Examiner BELLMAN. How much time elapsed between the time you received the request and the time you actually furnished this pay roll?

The WITNESS. I wish I could tell you but I can't. I know I made the remark——

Trial Examiner BELLMAN. Why do you think this is material?

Mr. MOCH. I will withdraw the question.

Q. Can you tell us, of your own knowledge, approximately what time the polls closed?—A. My guess is 3:30.

Q. Can you tell us whether or not most of the employees returned to work or went home after voting?—A. Most of them left early that day.

Mr. MOCH. That is all.

Trial Examiner BELLMAN. Any question?

Mr. HALLORAN. No questions.

150 Mr. ROEWER. No questions.

Trial Examiner BELLMAN. The witness is excused.

(Witness excused.)

Mr. MOCH. I merely bring this up because I do not wish to get caught on it. I have gone into it before.

This is a proceeding for refusal to bargain. Before that can be ascertained this challenged ballot must be produced and what the vote is must be discovered.

Reserving all rights in connection with that, even if you toss out this vote, the vote is still going to be 115 to 114.

Trial Examiner BELLMAN. I understand what your contentions are.

Mr. MOCH. If we close this hearing without opening up that challenged ballot problem, I just want to be sure that we are not

going to end up with a vote of 115 to 114, even though you decide in our favor on the issue which we have been trying all day.

Trial Examiner BELLMAN. How would you propose to bring this challenged ballot before me? In other words, what is your proposition?

Mr. MOCH. I think the Regional Director should have decided the union's challenge and, if he overruled it, should have opened the ballot.

Trial Examiner BELLMAN. You think the Regional Director should have thrown out the vote of Mrs. Kane, and, by
151 having thrown out her vote, the challenged ballot would be material in determining the election?

Mr. MOCH. I do not know how you would suggest proceeding. I just want to be sure that you do not find that Mrs. Kane's vote should be tossed out and end up with 115 to 114, and have to come back and open up that challenged ballot.

Trial Examiner BELLMAN. I shall make an intermediate report to the board, a copy of which is served upon all the parties, and you will have your opportunity to take any exception to that. I suppose that would be the place at which you would take exception to any such action on my part as you now contemplate might be possible.

Mr. MOCH. If you decide that Mrs. Kane's vote should be tossed out, then what happens?

Trial Examiner BELLMAN. The intermediate report will be served on the parties and you will take an exception, I suppose.

Mr. MOCH. Even though you toss it out they will say, "We have a count of 115 to 114."

Trial Examiner BELLMAN. And one challenged ballot.

Mr. MOCH. Yes.

Trial Examiner BELLMAN. It seems to me you are resting your contention on the assumption that the challenged ballot would be material in determining the outcome and would have to be opened and counted.

152 Mr. MOCH. I will rest on that.

Trial Examiner BELLMAN. If you want to produce the challenged ballot I would have to subpoena it because it is not here.

According to your contention, if you are upheld there is a next step which would have to be taken before a majority could be decided?

Mr. MOCH. Yes.

Trial Examiner BELLMAN. I do not know how you can take the next step after this step, before this step has been taken. You have further witnesses?

Mr. MOCH. No, sir; we rest.

Mr. HALLORAN. I have a witness in rebuttal.

Trial Examiner BELLMAN. Since all of the parties have rested, no one has called Mrs. Kane on your direct presentation at least. I do not want the record to be silent on whether or not the Trial Examiner would be willing to issue a subpoena for her. I will state now that if anyone wants to subpoena Mrs. Kane, I will be glad to hear him on the question of a subpoena. Do I hear any request for a subpoena, from any of the parties?

Mr. HALLORAN. The Board is not requesting a subpoena.

Mr. ROEWER. The union is not requesting a subpoena.

Mr. MOCH. Neither is the respondent.

Trial Examiner BELLMAN. Is there any rebuttal?

153 Mr. HALLORAN. I have a witness in rebuttal, sir.

Mr. ROEWER. May that name appear on the record as Mrs. Kane and not Miss Kane?

Trial Examiner BELLMAN. All right. It will be so corrected.

WILLIAM I. SHOOER, a witness called in rebuttal by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. HALLORAN:

Q. What is your name?—A. William I. Shooer.

Q. Where do you reside?—A. Cambridge, Massachusetts.

Q. You are an agent of the National Labor Relations Board attached to the First Region?—A. I am a field examiner attached to the First Region.

Q. At some time were you assigned to the representation case involving the A. J. Tower Company?—A. I was assigned so far as conducting the election was concerned; yes.

Q. I assume you were present when the election was held?—A. I was.

Q. At the close of the election, during the counting of the ballots, will you state whether or not Mr. Elbery was present?—

154 A. At the counting of the ballots, to the best of my knowledge and recollection, Mr. Elbery, Mr. Newman, Mr. Moch, and Mr. Noonan, and three union representatives, Mr. Barker.

Mr. MOCH. I object, if your Honor please.

Trial Examiner BELLMAN. Let me ask the materiality.

Mr. HALLORAN. I wanted to clear the road as I went along. Mr. Elbery's recollection was that this witness was not present at the time. I wanted to get out of the way that the witness was present, and then I will go on to the other matter.

A. (Cont.) Mr. Barker, a young union lady whose name I don't recall, another man, Miss Fountain, and myself representing the board, as well as the two observers for the company and the two observers for the union, were present at the count.

Q. At some time after the election do you know that objections to the election were filed?—A. Yes; I do.

Q. And there were two conferences held here in the office in connection with such objections?—A. Yes.

Q. In connection with that subject matter, Mr. Shooer, did you visit Mrs. Jennie A. Kane?—A. I did. I investigated the objections to the election.

155 Q. As a result of your investigation and immediately thereafter did you write a memorandum relative to the conversation that you had with Mrs. Kane?—A. I did.

Q. If necessary, Mr. Shooer, you may refresh your recollection from that memorandum?

Trial Examiner BELLMAN. Are you going to enter the memorandum or are you going to exhaust the witness' memory before refreshing his recollection? Are you going to ask him to use this document and testify from it or read it into the record?

Mr. HALLORAN. I see the Trial Examiner's point. I am willing to follow the regular procedure.

Q. Will you state to the Trial Examiner the date when you first talked with Mrs. Kane?—A. Immediately after receiving the objections to the election, in the form of a letter written by the attorney for the company, Mr. Noonan, I was assigned to investigate the case and was told to interview the witness, Mrs. Kane. This was about a day after we received that letter.

I attempted to reach her that night and was unsuccessful but succeeded in interviewing her, the next morning, which would make it May 10 or May 11.

Q. Assuming that the letter from Mr. Noonan was dated May 9 and received in this office on May 10, do you know

156 about when it was that you went to see Mrs. Kane?—A. I attempted to see her that very night but failed to do so and saw her on the 11th.

Q. Will you state to the Trial Examiner the conversation you had with Mrs. Kane?

Mr. MOCH. I make the same objection which my brother made when I attempted to do exactly the same thing with Mr. Elbery. It is exactly the same situation and exactly the same type of testimony. His objection was sustained and this is completely analogous.

Mr. HALLORAN. The objection was not sustained.

Trial Examiner BELLMAN. You withdrew the objection and proceeded by another route to place the affidavit in evidence.

Mr. MOCH. I think you ruled that the objection was sustained.

Trial Examiner BELLMAN. We will go off the record and have the stenographer read the record at that point.

(Discussion off the record.)

On the record.

The record has been read, and at the present time it does not appear that the Trial Examiner made a ruling. The completed record will show what actually transpired earlier in the hearing. Go ahead, Mr. Moch, and make your objection.

157 Mr. MOCH. I make my objection on the ground that evidently Mr. Shooer is going to be questioned about his conversation with Mrs. Kane and along the same lines as my brother so ably gave me, I object to this on the ground of hearsay. If he wants to produce Mrs. Kane as a witness he is at perfect liberty to do so.

Trial Examiner BELLMAN. It appears that this testimony is matter which came before the Regional Director in the course of his investigation, just as your affidavit which you have introduced came before him.

In any event, none of the parties seem to be anxious to subpoena Mrs. Kane, although I indicated that I would hear you on the issuance of a subpoena.

Mr. MOCH. This interview that is set forth in the Regional Director's report on objections was never presented at any hearing or conference at which the respondent was represented. This is the first time I ever saw it or heard about it or knew anything about it.

Trial Examiner BELLMAN. This will give you a full opportunity to cross-examine Mr. Shooer on whatever he says Mrs. Kane told him.

Mr. MOCH. Please note my objection.

Trial Examiner BELLMAN. Your objection is on the record. I will overrule it.

By Mr. HALLORAN:

158 Q. You say that on May 11 you went out and talked with Mrs. Kane?—A. Yes.

Q. Give us your best recollection as to what conversation took place between you and Mrs. Jeuuie A. Kane on that day. Was it in the morning, in the afternoon, or in the evening?—A. I visited Mrs. Kane about 9 in the morning.

Q. Was there anybody else present besides you and Mrs. Kane?—A. Mrs. Kane, at the first part of the interview, was alone. Later she was joined by her daughter.

Q. Will you state the conversation with her?—A. I explained to Mrs. Kane my connection, telling her I was an agent of the board and was assigned to investigate the case, that the company had objected to the election on the ground that she was not an eligible voter. I further went into detail and requested informa-

tion concerning her attempt to secure benefits from the Unemployment Compensation Bureau.

Mrs. Kane told me that she had been advised by friends of hers that the only way to get any money was to go to the Unemployment Compensation Bureau and apply for it, she thinking she was entitled to it as a matter of course because she was ill and not because she contemplated removing herself from the employ of the A. J. Tower Company.

I informed her that her step was incorrect so far as the law was concerned.

I then went into detail and asked her concerning a statement by the company's counsel to the effect that she had
159 voted for the union, and I said, "Did you say, 'I voted for the union?'" She said, "No. They asked me what my feelings were, and I told them that the union was a good thing. I don't recollect saying that I voted for the union. Of course they could tell—from the way I described it they might presume I did vote for the union." That was about the sum and substance of it.

I said, "Do you consider yourself an employee of the company?" She said, "I am sick." She gave me a doctor's certificate to show that she was out before and she was ill, and she said she hadn't worked elsewhere. She is an old woman and she thought when she felt better she would go back to the company and work there. I asked her how soon she would get back. She said, "There is no telling. It may be a month or two months. I can't say."

Q. Did you take a sworn statement from Mrs. Jennie Kane at that time?—A. No; not at that time. Subsequently I again visited her and explained to her that what I was more or less interested in was acquiring some information, and I then read it back to her after she had dictated it to me. I secured a sworn statement later.

Q. Is this the original of the sworn statement, written in pen on yellow, lined paper?—A. Yes. This is in my handwriting
160 and this was taken while I was talking with Mrs. Kane. When I finished writing the statement I read it to her in detail and asked her if it was the truth and I swore her to it and she signed it before me.

Q. This typewritten document is a typewritten copy of the statement made by Mrs. Kane to you?—A. Yes.

(Thereupon the paper above referred to was marked as "Board's Exhibit 7" for identification.)

Mr. HALLORAN. I am offering in evidence, Mr. Trial Examiner, the original statement given by Mrs. Kane to Field Examiner Shooer, and sworn to on the 21st of May 1944. And, if it is admitted in evidence, I will ask permission to withdraw it immediately and submit a copy of the said statement.

Mr. Moch. Evidently this is going to go on a little while longer. I want to examine that statement. May I have about a 60-second adjournment in order to make a phone call?

Trial Examiner Bellman. Yes. If this phone call is in order to cancel another appointment and continue, I can give you a few minutes recess.

Off the record.

(Discussion off the record.)

On the record.

Mr. Moch. Do I understand this is a copy?

Mr. Halloran. That is a copy of the written document.

161 Trial Examiner Bellman. Off the record.

(Discussion off the record.)

On the record.

Mr. Halloran. I offer the original statement and a copy of the same in evidence.

Mr. Moch. I object on the ground that there is no opportunity to cross-examine Mrs. Kane in connection with this affidavit.

Trial Examiner Bellman. You wish to submit a typewritten copy in lieu of the original?

Mr. Halloran. I ask permission to submit a typewritten copy in lieu of the original.

Trial Examiner Bellman. I will overrule the objection.

Mr. Moch. Note my exception.

Trial Examiner Bellman. Your exception is automatic. The document is admitted as "Board's Exhibit 7."

(The document heretofore marked as "Board's Exhibit No. 7" for identification was received in evidence.)

Mr. Halloran. That is all the evidence from the Board at this time.

Trial Examiner Bellman. Before you rest your rebuttal, are there further questions by the union?

Mr. Roewer. No questions.

Trial Examiner Bellman. You may cross-examine, Mr. Moch.

Cross-examination by Mr. Moch:

162 Q. When you talked to Mrs. Kane on April 23——A. May 23.

Q. Prior to writing out this statement (Board's Exhibit 7) did you tell her the result of the election?—A. She knew the result of the election.

Q. She knew the result of the election?—A. Yes.

Q. Did you tell her that the result of that election would probably hinge upon her vote?—A. No. I said the company was objecting to the election on the basis of her being an ineligible employee.

Q. She knew the company was objecting to her vote on the basis of her being ineligible or, as I would rather put it, on the basis of her being a nonemployee?—A. That is right.

Q. Did you tell her that she could get unemployment compensation if she was out sick?—A. No. That is not what I said.

Q. Did you tell her she could get unemployment compensation if she was out and was not sick?—A. I told her she was mistaken in her opinion so far as unemployment compensation benefits were concerned, in thinking if she was out sick she was entitled to something.

Q. Indicating that if she was sick she was not entitled to
163 unemployment compensation?—A. That is right.

Q. Did she tell you she had voted for the union?—A. No. She told me that she had favored the union. I said, "I am not interested in how you voted." She said, "All I indicated to the company officials was that I favored the union; I said the union was a good thing, but I didn't tell them I voted for the union so far as the ballot was concerned." Nor did she reveal that fact to me.

Q. She told you she was in favor of the union?—A. She said she thought the union was a good thing and that she favored the union, but she didn't say that she voted for the union, nor was the question asked.

Q. Did you draw to her attention the statement which Mr. Elbery and Mr. Hession secured from her and that she signed?—A. I did draw her attention to the statement.

Q. Did you draw her attention to the fact that she signed it?—A. I did.

Q. In the face of that she said she did not sign it?—A. She did not make any statement of that kind. She said she did sign it, but several things that she had said were not included in the statement submitted by the company.

Q. She did not say that statement was a wrong statement?—A. She said that statement was misconstrued so far as the language was concerned.

164 Q. She said it was misconstrued?—A. Yes.

Q. That misconstruction was in connection with where she said: "I applied for Social Security benefits because of this." And she goes on to say, "but the sentence should have been continued to show it was because of my sickness and not infer that I had left the company because the work was too heavy"?—A. Definitely.

Q. The net result is that she had no remarks to make counteracting the statement that is already in evidence (Respondent's Exhibit 2), which says that she "voted for the union at the election"? She did not counteract that at all?—A. She did.

Q. I thought you said the only thing she said was that her statement was misconstrued?—A. Parts of the statement were misconstrued, and, secondly, I said that she did not say that she said specifically that she voted for the union.

Q. Did she say that she did not write out or sign that statement that said she did [referring to Respondent's Exhibit 2]?—A. She said she didn't say that particular sentence that "I voted for the union."

Q. She said she did not say that particular sentence?—
165 A. She said she did not say it.

Q. Are you trying to tell the Trial Examiner that she said she didn't sign a statement with that statement in it?—A. She signed a statement not realizing what she was signing.

Q. She read this statement (Respondent's Exhibit 2)?—A. She read that statement and it was reread to her.

Q. She did not indicate that she did not read that statement?—A. She said to me that the other statement was read to her.

Q. Did she indicate to you that she did not read it?—A. She indicated to me that she hadn't read it.

Q. Did she tell you that she had not read it?—A. I don't recall her telling me that she hadn't read it.

Q. You are familiar with the Report on Objections?—A. More or less; yes.

Q. There are in quotes four paragraphs at the bottom of the page [indicating], all of these paragraphs are in quotations?—A. Yes.

Q. You are the agent referred to in the second paragraph [referring to Board's Exhibit 3-E]?—A. Yes.

Q. Those words that are within the quotations purport to be assertions by Mrs. Kane?—A. In fact I believe they are copied from the affidavit submitted by Mrs. Kane, taken in my
166 presence and sworn to before me.

Q. Did she actually assert those very identical words to you?—A. Well, if you mean the language, the identical language?

Q. Yes.—A. I should say No.

Q. Although it is in quotation marks?—A. It is in quotations.

Q. Indicating that she did assert?—A. I do not know what it did indicate. It indicates just what it means.

Q. She did not assert orally, in exactly those words, at any time while you were there?—A. I wouldn't say that.

Q. She did assert those same words orally?—A. She asserted the words but she didn't use the language identically.

Q. She did not use that identical language?—A. I believe she used that identical language. There are a few phrases in there which are my own terminology in explaining what she was saying.

Q. All I am trying to do is to find out whether she actually said exactly what it says right there, not in meaning, but exactly.—A.

I should say that 95 percent of what is written there
167 is exactly what she said right there.

Q. I wish you would answer the question.—A. I am trying to.

Mr. HALLORAN. Aren't we quibbling over something? Even though there may have been a ten-syllable word there that she could not conceivably have uttered, doesn't it remain that she adopted it when she signed the affidavit?

By Trial Examiner BELLMAN:

Q. Does the witness know whether the quotation marks, which appear in the Regional Director's report, are quotation marks intended to indicate a verbatim transcription of Mrs. Kane's words or are quotation marks intended to indicate quotations from the statement which has been put in evidence?—A. I believe the latter is true, that they are quotations from the statement put in evidence (Board's Exhibit 7).

Q. Do you know whether the statement which was put in evidence and which was obtained in the method which has been described, was a verbatim transcription of the words falling from the lips of Mrs. Kane or was any part of her use of words interpreted in words of your own?—A. I attempted to take it down verbatim. I would question her on a certain phase of the investigation and she would answer, and I would write it down. I should say 90 percent of the words that appear in this affidavit (Board's Exhibit 7) are her own words, taken verbatim as she dictated it to me.

168 Q. Can you separate the 95 percent and the 5 percent?—A. I dont' believe she used the word "misconstrued." That is my special word. I don't see anything else in there (Board's Exhibit 7) which would be my own terminology.

By Mr. MOCH:

Q. You mean she started with the words "On April 28, 1944," and said all that [referring to Board's Exhibit 7]?—A. At one time or another.

Q. Without any interruption? You say that is what she said. I want to know whether that actually came out of her mouth?—A. Mr. Moch, I must explain the way these affidavits are secured.

Trial Examiner BELLMAN. I think the record shows how the affidavit was taken. The affidavit will indicate whether it was set up in conversation form, like the lines of a play, or whether it was put in paragraph form.

Do you think anything material can be developed by going further into this line of questioning?

Mr. MOCH. I am going to stop with that.

By Mr. Moch:

Q. While you were questioning Mrs. Kane did you have any conversation relative to her having her name placed upon the list of individuals available for jobs, with the United States Employment Service?—A. Yes.

169 Q. What was the nature of that conversation?—A. She said that when she went and applied for unemployment compensation they told her to go to the U. S. E. S. before they could send her any money.

Q. While you were there did she indicate to you that she was sick or ill?—A. She looked sick and she showed me her doctor's certificate and said she was sick.

Q. The doctor's certificate showed that she was not capable of doing any remunerative work?—A. I don't recall what it said. I have a copy of it in the file. I think it would speak for itself.

Trial Examiner Bellman. Off the record.

(Discussion off the record.)

On the record.

Are the parties all agreed that instead of putting in evidence the copy of the doctor's certificate to which the witness has testified, the contents thereof may be read in by the witness?

Mr. Halloran. The Board is agreeable.

Mr. Roewer. The union is agreeable.

Mr. Moch. That is correct.

Trial Examiner Bellman. Will you read from the file what the doctor's certificate said?

The Witness. The doctor's certificate was on the form
170 of a prescription blank generally used when you prescribe medicine or something and, after the usual form with an "R" and a tail on the "R," "Saavas E. Theodore, M. D." and his address, 407 Huntington Avenue, Boston, Massachusetts.

Then again we have the "R" with the tail over the bottom of the "R."

"To Whom It May Concern:

This is to certify that Mrs. Kane has been under my care because of general weakness, and I feel she cannot engage in any gainful occupation." And it bore the signature of the doctor, S. E. Theodore, and the date 3.31.44.

By Mr. Moch:

Q. While you were there did she indicate in any way that she was dangerously ill?—A. No. She said that she was feeling poorly.

Q. You stated that when you first went to Mrs. Kane's she was alone, and later her daughter came in?—A. That is right.

Q. At what stage in your conversation did the daughter ap-

pear?—A. About the middle of the conversation. I was about half way through the interview when the daughter appeared on the scene.

Q. Did the daughter stay to the end of the conversation?—A. Yes. She went in and out of the room. I was sitting
171 in the parlor there.

Q. Most of the time you were alone with Mrs. Kane?—A. That is right; the first of the interview.

Redirect examination by Mr. HALLORAN:

Q. Was the daughter present at the time the affidavit was executed?—A. The affidavit was executed on the second interview and the daughter was present all the time during that, as well as Mrs. Kane's granddaughter and daughter-in-law.

Q. Three persons besides Mrs. Kane were present?—A. The daughter-in-law joined the group about half way through the examination of Mrs. Kane.

Mr. HALLORAN. I think that is all.

Trial Examiner BELLMAN. Any questions?

Mr. ROEWER. No questions.

Mr. MOCH. No questions.

Trial Examiner BELLMAN. The witness is excused.

(Witness excused.)

Is there any further rebuttal?

Mr. HALLORAN. No further rebuttal.

Trial Examiner BELLMAN. Does the respondent have anything further which it wishes to produce?

Mr. MOCH. No.

Mr. HALLORAN. At this time I move that the pleadings be amended to conform to the evidence so far as the amend-
172 ments concern ordinary incidents such as names, dates, and so forth, which do not tend to alter the substance of the complaint.

Trial Examiner BELLMAN. I believe you used the term "pleadings." I take it you mean both the complaint and the answer?

Mr. HALLORAN. That is correct.

Trial Examiner BELLMAN. Is there any objection?

Mr. MOCH. No objection.

Trial Examiner BELLMAN. I will grant the motion which was made, conforming the pleadings to the proof on such matters as Mr. Halloran has indicated.

As was indicated in an off-the-record discussion a while ago, I am not going to insist on oral argument at the close of the hearing because I believe the issues were argued with considerable elucidation, to me at least, in the period before the lunch recess.

If, however, any of the parties wish to make any closing points

omitted or to reiterate any points in view of the evidence, I will hear you at this time.

Does the Board have anything it wishes to add to the argument already on the record?

Mr. HALLORAN. No, sir.

Trial Examiner BELLMAN. Does the union?

Mr. ROEWER. No. We will submit a brief.

173 Trial Examiner BELLMAN. Does the respondent wish to add to the argument already on the record?

Mr. MOCH. No. We will likewise submit a brief.

Trial Examiner BELLMAN. I have already indicated that if you gentlemen wished to file briefs and would so indicate before the close of the hearing, you will be given an opportunity to do so.

I would like to have the briefs in the mail by a week from this coming Saturday, which gives you a little longer than usual. Get them postmarked by Saturday, August 12.

Does the respondent desire to file a brief?

Mr. MOCH. Yes, sir.

Trial Examiner BELLMAN. Does the Board?

Mr. HALLORAN. The Board will file a brief.

Trial Examiner BELLMAN. Does the union intend to file a brief?

Mr. ROEWER. We rserve the right to file one.

Trial Examiner BELLMAN. As I indicated earlier, these briefs are to be directed to the Trial Examiner in care of the Chief Trial Examiner, Washington, D. C.

There are no rules requiring that you exchange briefs beforehand or that you work out reply briefs but, of course, any courtesies you want to extend to each other you can work out among yourselves.

You should serve the other parties with copies of your

174 brief and send five copies to the Trial Examiner in care of the Chief Trial Examiner at Washington.

Does the Board have anything else to offer before the hearing closes?

Mr. HALLORAN. The Board has nothing further.

Trial Examiner BELLMAN. Has the union?

Mr. ROEWER. No, sir.

Trial Examiner BELLMAN. Or the respondent?

Mr. MOCH. No, sir.

Trial Examiner BELLMAN. The hearing is closed.

(Whereupon, at about 5:15 p. m. on August 3, 1944, the hearing in the above-entitled matter was closed.)

176 *Exhibit B-1*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1-C-2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. *6 L.)

COMPLAINT

It having been charged by Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), Boston, Massachusetts, that the A. J. Tower Company, hereinafter called the Respondent, has engaged and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act, the National Labor Relations Board, by the Regional Director for the First Region (Boston, Massachusetts), as agent of the Board designated by National Labor Relations Board Rules and Regulations—Series 3, Article IV, Section 1, hereby issues its Complaint and alleges the following:

1. The Respondent is, and has been at all times hereinafter mentioned, a corporation organized under and existing by virtue of the laws of the Commonwealth of Massachusetts, and is now, and has been at all times hereinafter mentioned, engaged at a place of business in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, in the manufacture and sale of waterproof oiled clothing, hats, and fabrics.

177 2. The Respondent, in the course and conduct of its business, causes and has continually caused a substantial part of the raw and other materials used by it in the manufacture of its waterproof oiled clothing, hats, and fabrics to be purchased and transported in interstate commerce from and through states of the United States other than the Commonwealth of Massachusetts to its plant in Boston, Commonwealth of Massachusetts, and causes and has continually caused a substantial part of the waterproof oiled clothing, hats, and fabrics manufactured by it to be sold and transported in interstate commerce from its plant in Boston, Commonwealth of Massachusetts, to, into, and through states of the United States other than the Commonwealth of Massachusetts.

3. Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), is a labor organization within the meaning of Section 2, subdivision (5) of the Act.

4. All employees of the Company, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subdivision (b) of the Act.

5. On or about May 5, 1944, a majority of the employees in the unit described in Paragraph 4 above designated the Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), hereinafter called the Union, as their representative for the purposes of collective bargaining with the Respondent. On or about said May 5, 1944, the Union was, and at all times thereafter has been, the representative for collective bargaining of a majority of the em-
178 ployees in said unit, and by virtue of Section 9, subdivision (a) of the Act was, and has been, and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

6. On or about May 25, 1944, and at all times thereafter, while the Respondent was engaged in the conduct of its business as set forth in Paragraphs 1 and 2 above, the Union, acting pursuant to its status as the exclusive representative of all the employees described in Paragraph 4 above, sought to bargain collectively with the Respondent in respect to matters pertaining to wages and other conditions of employment.

7. On or about June 6, 1944, and at all times thereafter, the Respondent did refuse to bargain collectively with the Union through its duly authorized agents on the matters which the Union sought to bargain on with the Respondent, as set forth in Paragraph 6 above.

8. By the acts of the Respondent set forth in Paragraph 7 above, the Respondent, by its officers, agents, and employees, interfered with, restrained, and coerced its employees, and is interfering with, restraining, and coercing its employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection; and by said acts, the Respondent, by its officers, agents, and employees, did engage in, and is engaging in, unfair labor practices

within the meaning of Section 8, subsection (1) of the Act.

179 9. By the acts of the Respondent set forth in Paragraph 7 above, the Respondent, by its officers, agents, and employees has failed and refused, and is failing and refusing, to bargain collectively with the Union, and has thereby engaged in, and is thereby engaging in, unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

10. The activities of the Respondent, as set forth in Paragraph 7, occurring in connection with the operations of the Respondent described in Paragraphs 1 and 2 above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The aforesaid acts of the Respondent, hereinabove described, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (5), and Section 2, subsections (6) and (7) of the Act.

Wherefore the National Labor Relations Board on this 24th day of July 1944, issues its Complaint against the A. J. Tower Company, Respondent herein.

[SEAL] A. Howard Myers,
A. HOWARD MYERS,
Regional Director for the First Region,
Old South Building, Boston, Massachusetts.

182 N. L. R. B. 29 (Revised 8-9-41).

UNITED STATES OF AMERICA

183 BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1-C-2416

Date Filed June 9, 1944

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

Charge

June 9, 1944

Pursuant to Section 10 (*b*) of the National Labor Relations Act, the undersigned hereby charges that A. J. Tower Company, at

18 Simmons Street, Roxbury, Massachusetts, employing 275 workers in manufacture of raincoats and waterproof garments has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of said Act, in that on or about June 6, 1944 and at all times thereafter, the said Company, by its officers, agents, and employees, refused to bargain collectively with the representatives of Local #24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), a labor organization chosen by a majority of its employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment; and

By the acts set forth in the paragraph above, and by other acts and conduct, the said Company, by its officers, agents, and employees, has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

888 Washington Street, Boston, Mass.

George E. Roewer,
By: GEORGE E. ROEWER, *Attorney.*
20 Pemberton Square, Boston, Massachusetts, Cap. 7010.

Subscribed and sworn to before me this 9th day of June 1944 at Boston, Massachusetts.

William I. Shooer,
WILLIAM I. SHOOER,
Field Examiner, N. L. R. B., 1st Region.

183 BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

Respondent's answer

And now comes the A. J. Tower Company, hereinafter called the Respondent, and for answer in the above entitled case denies that it has engaged or is now engaging in any unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act. And in further answering to the complaint:

1. The Respondent admits the allegations contained in paragraph one of the complaint.

2. The Respondent admits the allegations set out in paragraph two of the complaint.

3. The Respondent is without knowledge as to the facts set out in paragraph three of the complaint.

4. The Respondent denies that the employees set out in paragraph four of the complaint constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9, subdivision (b) of the Act.

5. The Respondent denies each and every allegation set out in paragraph five of the complaint. And answering further the Respondent alleges that Local No. 24, Waterproof Garment Workers Union, Affiliated with International Ladies' Garment

184 Workers Union, (A. F. of L.) hereinafter called the Union, has never been designated as the representative of a majority of the Company's employees in any appropriate unit for the purpose of collective bargaining with the Respondent. The Respondent also alleges that the Union is not and never has been the representative for collective bargaining of a majority of the Respondent's employees in any appropriate unit.

And answering further the Respondent alleges the following: A consent election was held May 5, 1944, for the purpose of determining whether or not the employees designated in an Agreement for Consent Election, executed and approved April 27, 1944, desired to be represented by the Union. In determining the results of this election one ballot was not counted because it was challenged by the Union. This challenge was not and has not been passed upon. Also one ballot, which was counted, was cast for

the Union by Mrs. Jennie A. Kane, who was not and has not since been an employee of the Respondent. Inasmuch as Mrs. Kane was not an employee of the Respondent at the time of the consent election her ballot should not be counted as a vote cast for the Union. If the Union's challenge, above mentioned, is not sustained and the challenged ballot upon being opened for the purpose of counting proves to be a vote against the Union, and if Mrs. Kane's ballot is not counted, as it should not be, the result of the election is a tie and the Union has not been designated the collective bargaining representative of the majority of the employees involved.

6. The Respondent admits that on or about May 25, 1944, while the Respondent was engaged in the conduct of its business as set forth in paragraph one and two of the compiaint, the Union sought to bargain collectively with the Respondent in respect to matters pertaining to wages and other conditions of employment; but the Respondent denies that the Union was acting pursuant to any status as an exclusive representative of any employees of the Respondent.

185 7. The Respondent admits that it has refused to bargain collectively with the Union. And answering further, the Respondent explains that it has refused to bargain collectively with the Union because the Union has not been validly chosen as the bargaining agent of the majority of the Respondent's employees in an appropriate bargaining unit, which refusal is the Respondent's right.

8. Paragraph eight of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that paragraph. The Respondent, however, denies each and every allegation set forth in paragraph eight of the complaint.

9. Paragraph nine of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that paragraph. The Respondent, however, admits that it has refused and is refusing to bargain collectively with the Union but it denies that it has thereby engaged in or is thereby engaging in unfair labor practices under the meaning of section 8, subsection (5) of the Act.

10. Paragraph ten of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that paragraph. However, the Respondent denies each and every allegation set forth in paragraph ten of the complaint.

11. Paragraph eleven of the complaint does not set forth any facts and therefore the Respondent is not called upon to admit or deny or explain any of the allegations set forth in that para-

graph. However, the Respondent denies each and every allegation set forth in paragraph eleven of the complaint.

185–A Wherefore, the Respondent prays that the complaint be dismissed.

A. J. TOWER COMPANY.
By F. A. NEWMAN.

A. J. TOWER COMPANY,
Vernon and Simmons Sts.,
Boston 20, Massachusetts.

Subscribed and sworn to before me this first day of August. 1944.

[SEAL] ROBERT G. MOCH,
Notary Public.

186 *Exhibit B–2*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1–C–2416

In the Matter of A. J. TOWER COMPANY *and* LOCAL #24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

STIPULATION

It is hereby stipulated by and between the A. J. Tower Company and the National Labor Relations Board that the following facts may be received in evidence on behalf of any of the parties to this stipulation with the same force and effect as if properly qualified witnesses were called before the Board and gave under oath sufficient and competent evidence of each of the matters and things hereinafter set out, but without prejudice to the right of the National Labor Relations Board, the A. J. Tower Company or any party hereto to object to the materiality or relevance of such facts.

THE COMPANY AND ITS BUSINESS

The A. J. Tower Company was incorporated under the laws of the Commonwealth of Massachusetts in 1926. It is engaged in the business of manufacture and sale of waterproof oiled clothing, aprons, hats and fabrics. The Company has one wholly owned subsidiary, the A. J. Tower Sales Company, a Massachusetts cor-

poration. The main office of the Company and its principal plant is located in Roxbury, Massachusetts.

The principal raw materials used in the Company's business are various cotton textiles, oils, threads, fastenings, and sun-
187 dries. During the calendar year 1943, in excess of $1,000,-000 was expended for raw materials, approximately 90% of which was shipped from points outside the Commonwealth of Massachusetts.

The dollar value of finished products during 1943 was in excess of $2,500,000, of which approximately 95% was transported to points outside the Commonwealth of Massachusetts. During the said year 1943 $2,250,342.08 of the Company's output went to various departments of the United States Government.

THE UNION

Local #24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.) is a labor organization within the meaning of the National Labor Relations Act and admits to membership certain employees of the Company.

THE ELECTION AND CERTIFICATION

On or about April 24, 1944, the Union, hereinabove referred to, filed with the First Region Office of the Board a Petition for Certification of Representatives under Section 9 (c) of the Act, seeking representation for certain employees of the Company. Subsequent thereto, to wit, on April 27, 1944, Agreement for Consent Election was entered into, providing for an election to be held on May 5, 1944, to determine whether or not the Union was desired as bargaining agent by employees in the following unit:

"All employees of the Company, at the Roxbury plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees."

On May 5, 1944, the said election was held under the supervision of a Board Agent. Both the Company and the Union had observers present during the balloting and during the counting and tabulation of ballots. There were approximately 250 eligible voters; 230 votes were counted; 116 votes were cast for the
188 Union and 114 against the Union; there was one ballot challenged by the Union.

On May 9, 1944, the Company, by its attorney, filed certain objections to the conduct of the election. A conference for the purpose of considering the objections was held on May 12, 1944, and a hearing on the objections was held on May 22, 1944, at which

were present representatives of the Company, the Union and the Board.

On May 24, 1944, the Regional Director issued his Report on objections, overruling the Company's objections and certifying the Union as bargaining agent for the employees in the unit hereinabove referred to. The Company duly received a copy of the said Report on Objections. On May 31, 1944, the Regional Director amended Paragraph 3 on Page 3 of said Report on Objections, notice of said amendment being duly received by the Company.

REQUEST TO BARGAIN AND REFUSAL

Under date of May 25, 1944, counsel for the Union directed a letter to the Company requesting a conference for the purpose of discussing a collective bargaining agreement to cover employees in the designated unit. A copy of this letter was sent to the attorney for the Company. Both the Company and the Company's attorney received the communications.

On June 6, 1944, the Company, by its attorney, sent a letter to the attorney for the Union stating that it was unwilling to enter into collective bargaining conferences until the Union shall have been validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held.

By ROBERT G. MOCH,
Attorney for A. J. Tower Company.

NATIONAL LABOR RELATIONS BOARD,

By WM. J. HALLORAN, *Attorney.*

Assented to by George E. Roewer, attorney for Union (Local 24, I. L. G. W. U.).

Dated Aug. 2, 1944.

189 NLRB–36a (Revised 11-8-43).

Exhibit B–3–A

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

FIRST

PETITION FOR CERTIFICATION OF REPRESENTATIVES

The undersigned Petitioner hereby alleges that the Employer named below has refused to recognize Petitioner as the exclusive

collective bargaining agent of all the employees in the bargaining unit hereinafter described and that such refusal has given rise to a question concerning representation affecting commerce within the meaning of the National Labor Relations Act. Pursuant, therefore, to Section 9 (c) of said Act, Petitioner requests the National Labor Relations Board to investigate such controversy and certify to the parties the name or names of the representatives designated or selected by the employees.

Do not write in this space—Case No. 1–R–1880. Docketed_____.

1. Name of employer, A. J. Tower Co.
2. Address of establishment, 22 Simmons Street, Roxbury, Mass.
3. Industry, manufacturers of oil clothing and rain-wear outer garments.
4. Petitioner, Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.).
5. The alleged appropriate bargaining unit includes all employees of the Company at the Roxbury plant, except for executives, foremen, assistant foremen, floor girls, maintenance employees, janitors, engineers, firemen and watchmen, office and clerical employees, shipping and packing room employees, and folding room employees.
6. The Unit contains approximately 190 employees, of which number majority have designated or selected petitioner as their bargaining representative.
7. The following individuals or labor organizations claim to represent employees in the Unit:

By (S) Nathan H. Barker,
NATHAN BARKER, *Manager*,
888 Washington Street, Boston, Mass.

Subscribed and sworn to before me this 24th day of April 1944, at Boston, Massachusetts.

(S) William I. Shooer,
WILLIAM I. SHOOER,
Field Examiner, NLRB—1st Region.

190

Exhibit B-3-B

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF A. J. TOWER CO.

Case No. 1-R-1880

AGREEMENT FOR CONSENT ELECTION

The undersigned Employer (herein called Employer) and the undersigned labor organization(s), subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director and the Board respectively), hereby agree as follows:

1. Secret ballot—An election by secret ballot shall be conducted under the supervision of the Regional Director, among the employees in the Unit defined below, at the indicated time and place, to determine whether or not the employees desire to be represented by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

Time and place of election—Friday, May 5, 1944, between 1:30 P. M. and 3:30 P. M. (place to be decided by agreement).

2. The unit—All employees of the Company, at the Roxbury plant except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees (herein called the Unit) constitute a unit appropriate for the purposes of collective bargaining.

3. Eligible voters—The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or rein-

stated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

Pay-roll period for eligibilty—April 21, 1944.

4. Names on ballot—In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

5. Notices of election—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligibile voters.

6. Observers—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to an observer designated by each party for such purpose.

7. Objections, challenges, reports thereon—Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon.

8. Consent determination of representatives—The Regional Director shall, if and when appropriate, issue a Consent Determination of Representatives to the parties, setting forth the name of the labor organization which has been designated and selected

as the exclusive representative of all the employees in the Unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

9. Run-of procedure—In the event that one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall conduct a run-off election at a time and place to be determined by him. Said run-off election shall be in accordance with Article III, Section 11 (b) and (c) of the Board's Rules and Regulations.

LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH THE INTERNATIONAL LADIES GARMENT WORKERS UNION (A. F. OF L.)

By (S) ALBERT FRAIOLI, *Asst. Mgr.*

A. J. TOWER CO.,

By (S) F. A. NOONAN, *Gen. Mgr.*

Recommended:

(S) James J. McFadden,
JAMES J. MCFADDEN,
Field Examiner National Labor Relations Board.

Date executed April 27, 1944.
Date approved April 27, 1944.

(S) A. Howard Myers,
A. HOWARD MYERS,
Regional Director National Labor Relations Board.

191 NLRB-216A (6-1-44).

Exhibit B 3-C

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

FIRST REGION

CERTIFICATION ON CONDUCT OF ELECTION

Name of employer, A. J. Tower Co. Case No. 1-R-1880.
Date of election, May 5, 1944. Place, Roxbury, Massachusetts.

The undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting at the above time and place.

We hereby certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots

in secret, and that the ballot box was protected in the interest of a fair and secret vote.

For A. J. Tower Co.:

(S) CHARLES KISSOCK.
(S) HELEN CONSIDINE.

For the Regional Director, 1st Region:

(S) W. I. SHOOER.

For Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.):

(S) CATHERINE DUNN.
(S) MABEL BEDARD.

192 NLRB-317 (11-8-43).

Exhibit B-3-D

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CONSENT ELECTION

Case No. 1-R-1880

Date issued 5/5/44

In the Matter of A. J. TOWER CO. *and* LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH THE INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

Approximate number of eligible voters	250
Valid votes counted	230
Votes cast for Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.)	116
Votes cast against participating union	114
Challenged ballots	1
Void ballots	0

A majority of the 231 valid votes and challenged ballots, which together are the basis for a majority, have been cast for Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies' Garment Workers Union (A. F. of L.).

Challenges are (not) sufficient in number to affect the results of the election.

For the Regional Director:

(S) W. I. SHOOER.

5/5/44.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

(S) HELEN CONSIDINE.

For A. J. Tower Co.:

For Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies' Garment Workers Union (A. F. of L.):

(S) NATHAN H. BARKER.

193 *Exhibit B-3-E*

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

FIRST REGION

Case No. 1-R-1880

In the Matter of A. J. TOWER CO. *and* LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, AFFILIATED WITH THE INTERNATIONAL LADIES' GARMENT WORKERS UNION (A. F. OF L.)

REPORT ON OBJECTIONS

Pursuant to the terms and provisions of the Agreement for Consent Election entered into by and between the parties in the above-entitled matter, the undersigned Regional Director of the National Labor Relations Board conducted an election by secret ballot on May 5, 1944.

On May 9, 1944, the Company sent a letter to the undersigned challenging the right of one Jennie A. Kane to vote in the election, challenging the ballot cast by her, and requesting a ruling on the one ballot reported as challenged in the Tally of Ballots issued in the above matter on May 5, 1944. In support of the request as to Mrs. Kane, the following facts were submitted:

"Mrs. Kane was employed by A. J. Tower Company from March 16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company

and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job.' The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment."

194 "The Company contends that irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane was ineligible beyond question. It submitted a witnessed statement signed by her on May 8, 1944, stating that she 'left the employ of A. J. Tower Co. in March 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition.'

"Subsequently interviewed by an Agent of the Board on May 23, 1944, Mrs. Kane asserted—'On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

"On May 8, 1944, Mr. Ellberry of the Co. and another gentleman whose name I've forgotten visited me at my home and questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted

at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say, I applied for social security benefits because of this, but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

"'Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A. J. Tower Co., which Miss Higgins, a fellow employee, carried for me. In the note, I told Miss Stone that I was under a doctor's care and that I intended to return to the Company as soon as I was well.

"'Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able and asked him would I get my job back or would he give me a release. Mr. Ellberry said I don't see why you need a release. This was in answer to my question, Would I need a release to obtain social security benefits? When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Co."

195 Subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security of the Commonwealth of Massachusetts on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do heavy work of carrying bundles.

A Notice to Employer of Claim Filed was sent to the Company by the U. S. Employment Service on May 1, 1944, the same day on which the Company submitted "a complete list of employees of the A. J. Tower Co. on the pay roll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944."

The Company contends that it does not know the exact date of receipt of the notice of claim, but concedes that it was undoubtedly received prior to the day of the election, and that it failed through oversight to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls. (See letter to Noonan 5/31/44.)

The Board Agent conducting the election reports that he followed the usual practice of instructing the observers at the election, including the two Company representatives, Helen Considine and Charles Kissork, who were accompanied by the Company counsel, of their right to challenge the ballot of any person believed ineligible to vote. These observers were present when Mrs.

Kane cast her ballot and did not challenge her right to vote. Prior to the count of the ballots, the Company tellers conferred with the Company counsel when asked to certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote their ballots in secret. After approval by counsel, both signed the usual Certification on Conduct of Election.

The fact remains that the list of eligible voters was prepared solely by the Company and was submitted by them as the exclusive list of eligible voters. Four or five days prior to the election, the Company knew, by reason of a letter from the U. S. Employment Service, that Mrs. Kane had made an application for unemployment compensation. It is this application that the Company urges as a basis for determining that she was not an employee at the time of the election and therefore not entitled to vote; yet not only did it do nothing to correct the eligibility list, but it did in fact acquiesce in her casting a ballot. Whether or not Mrs. Kane was an employee entitled to vote was, under the circumstances a fact peculiarly within the Company's knowledge. Yet it was not until four days after the election that they raised any objection to her vote.[1]

Although the question of Mrs. Kane's status as an employee is not quite clear, the undersigned is of the opinion that under the circumstances set forth the Company has waived its right to challenge her vote or to object to the election on this ground.[2]

196 To hold otherwise would vitiate the Board's procedure of having observers present at the polls, of challenges by such observers, and of certifications of conduct by the parties.

Since the overruling of this point makes unnecessary a ruling on the vote challenged at the election, the undersigned finds that a majority of the valid votes have been cast for the Union indicated below. Pursuant to Section 8 of the Agreement for Consent Election the undersigned hereby finds and determines that Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union (A. F. of L.) is the exclusive representative of all the employees in the unit defined in Section 2 of the Agreement for Consent Election, for the purposes of bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Boston, Massachusetts, this 24th day of May 1944.

[S] A. HOWARD MYERS,
Regional Director,
National Labor Relations Board.

[1] See N. L. R. B. v. Capitol Greyhound Lines, et al., No. 9502 U. S. C. C. A. 6th; decided January 31, 1944.

[2] See In re American Granite Finishing Company and International Union of Operating Engineers (XXVIII NLRB 739).

197 MAY 31, 1944.

JOHN T. NOONAN, *Esquire*,
Herrick, Smith, Donald, Farley & Ketchum,
1 Federal Street, Boston, Massachusetts:

Re: A. J. Tower Co.—Case No. 1–R–1880

DEAR MR. NOONAN: This is to acknowledge your letter of May 26, 1944, the contents of which I have considered.

In view of your objection, I am hereby amending Paragraph 3 on Page 3 of the Report on Objections to read as follows:

"The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in the opinion of the undersigned it failed, through oversight, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls."

Very truly yours,

A. HOWARD MYERS,
Regional Director.

cc: A. J. Tower Co., Boston, Mass.
Local No. 24, WGWU (AFL), Boston, Mass.
George E. Roewer, Esquire, Boston, Mass.

198 *Exhibit B–4–A*

MAY 25, 1944.

A. J. TOWER CO.
18 Simmons Street,
Roxbury, Mass.

Attention: Mr. Newman

GENTLEMEN: In view of the fact that Local 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union, has now been certified as the exclusive representative of all employees in the unit which participated in the election on May 5th, we hereby request, as attorneys for Local 24 and the International Ladies Garment Workers Union, an early conference between the representatives of the management and representatives of the union in order to take up with you the terms of a collective bargaining agreement covering wages, hours and working conditions.

We shall be glad to arrange our time to suit your convenience, but would suggest that the conference be held at an early date. Will you please notify Mr. Jacob Halpern, 888 Washington Street,

Boston, tel. Lib. 4108, or the writer, as to time and place when it will be convenient for you to meet a representative of the union.

I am sending a copy of this letter to Mr. John T. Noonan for his information.

Very truly yours,

ROEWER & REEL,
By (S) GEORGE E. ROEWER,
Attorneys for the
International Ladies Garment Workers Union.

199 *Exhibit B-4-B*

HERRICK, SMITH, DONALD, FARLEY & KETCHUM

FIRST NATIONAL BUILDING

1 Federal Street

Boston 10, June 6, 1944.

Messrs. ROEWER & REEL
20 Pemberton Square,
Boston 8, Massachusetts.

Attention Mr. George E. Roewer

DEAR SIRS: Your letter of May 25, 1944, addressed to the A. J. Tower Company has been referred to me as counsel for the Company.

In the light of certain matters having to do with the election held on May 5, 1944, with which you are familiar, the Company does not believe that Local #24 Waterproof Garment Workers Union has been validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held. Accordingly, I am constraining to advise you that the Company is unwilling to enter into collective bargaining conferences with this Union until it shall have been validly so chosen.

Very truly yours,

(S) JOHN T. NOONAN.

200 *Exhibit B-5*

MISS STONE:

Will you please Give the Bearer Mrs. Higgins my Pay Tomorrow. and she can sign my slip and oblige

(S) JENNIE KANE
187

Thank you.

P. S. I am sick thats why I have not been in this week

201 *Exhibit B-6*

MAY 9, 1944.

Dr. A. HOWARD MYERS,
National Labor Relations Board,
Old South Building,
294 Washington Street, Boston, Massachusetts.

Re: A. J. Tower Company—Case No. 1-R-1880

DEAR SIR: Subsequent to the election which was held in the above matter on May 5, 1944, it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company.

The facts with respect to Mrs. Kane as I have been advised of them are as follows:

Mrs. Kane was employed by A. J. Tower Company from March 16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she "could not continue to do heavy work of carrying bundles which was part of her job." The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment.

202 In the light of the above facts the Company hereby challenges the right of Mrs. Kane to vote in the election of employees at its plant and challenges the ballot cast by her.

In the election above referred to there was one ballot challenged by the Union which challenge was not passed on because it had appeared that the Uni ⌐ had won the election by two votes. In view of the fact that it would now appear that one person, not an employee of the Tower Company, had voted in this election, this ballot challenged by the Union may materially affect the final

election result. Accordingly, on behalf of the Company, I hereby request that a hearing be held for the purpose of passing upon this challenged ballot. If the challenge is not sustained and the ballot, upon being opened for the purpose of counting, proves to be a vote against the Union, it will become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane and the Company requests that a hearing upon such challenge be held.

Very truly yours,

(S) JOHN T. NOONAN.

JTN/KSJ.

203 *Exhibit B–7*

I, Mrs. Jennie A. Kane, 119 W. Brookline St., Boston, Mass., being duly sworn, depose and say: On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. *At no time*, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

On May 8, 1944, Mr. Ellberry of the Company and another gentleman whose name I've forgotten, visited me at my home and questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry, but my words have been misconstrued. I did say "I applied for social security benefits because of this" but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A. J. Tower Co., which Miss Higgins, a fellow employee, carried for me. In the note, I told Miss Stone that I was under a doctor's care and that I intended to return to the Company as soon as I was well.

Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able and asked him would I get my job back or would he give me a release. Mr. Ellberry said "I don't see why you need

a release." This was in answer to my question, "Would I need a release to obtain social security benefits?" When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Company.

(S) J. A. KANE.

Sworn to before me this 23rd day of May 1944 at Boston, Mass.

(S) W. I. SHOOER,
NLRB, Field Examiner.

204 NOTICE TO EMPLOYER OF CLAIM FILED

THE COMMONWEALTH OF MASSACHUSETTS,
Division of Employment Security
Social Security Account Number 029-10-4178.
Name Jennie A. Kane.
Address 119 W. Brookline St., Bos.
Date Claim Filed 4-28-44.
Last Occupation Stitcher.
Employer A. J Tower Co.
Address 33 Simmons St., Roxbury, Mass.
Notice mailed May 7, 1944, eff. wk. No. 5.
Date of Separation Mar. 1944. Reason for Separation Left—Couldn't continue to do heavy work of carrying bundles which was part of his job.

You are hereby notified that the above named individual has filed a claim with this division for unemployment benefits and has stated that you were his employer on the date of separation shown above.

If you know of any misrepresentation or other reason why payment of benefits should not be made to this claimant, you *must* under the law (G. L. 151A 438) complete this form and return it to the office location shown above within 7 days from the date appearing in the "notice mailed" block.

Payment of benefits to the individual named above may be affected by any one of the following reasons:

Left voluntarily without good cause attributable to the employer or his agent.
Sick or unavailable for work.
Suitable work now available.
Currently employed.

Discharged because of wilful misconduct.
Unemployed because of a labor dispute.
Receiving workmen's compensation, dismissal pay, vacation allowance, or Federal old age insurance.

These or Other Reasons Affecting the Claim Should be Detailed Below

If you return this form you will be notified only if benefits are awarded to the claimant, and you will have the right to apply for a review of the determination at that time.

DIVISION OF EMPLOYMENT SECURITY,
ROBERT E. MARSHALL, *Director.*

The following person in our organization may be called for further information, if necessary, relative to this claim.

205 *Exhibit R-2*

MAY 8, 1944

I hereby certify that I left the employ of A. J. Tower Co. in March 1944 because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition.

I have read the foregoing statement and it is correct.

J. A. KANE.

Witness:
W. J. HESSION.

206 In United States Circuit Court of Appeals,
Sixth Circuit

Minute entries

On June 15, 1945, a certified copy of the transcript of record was filed and leave was granted to proceed under Rule 24.

Thereafter, to wit, on November 7, 1945, this cause came on to be heard, and was fully heard by the Court, Honorable John C. Mahoney, Honorable Peter Woodbury, and, by special assignment, Honorable Albert Lee Stephens, Circuit Judges, sitting.

Thereafter, to wit, on December 13, 1945, the following opinion of the Court was filed:

207 In United States Circuit Court of Appeals for the First Circuit

No. 4099—October Term, 1945

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY, RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Before ALBERT LEE STEPHENS, MAHONEY, and WOODBURY, JJ.

Malcolm Halliday, Associate General Counsel, Louis Libbin, Attorney, for Petitioner. John T. Noonan, for Respondent.

Opinion of the court

December 13, 1945

MAHONEY, J. This case comes before us on petition of the National Labor Relations Board, hereinafter referred to as the Board, for enforcement of its order issued against A. J. Tower Company, hereinafter referred to as the Company, pursuant to § 10 (c) of the National Labor Relations Act (49 Stat. 452; 29 U. S. C. A. § 160) requiring the respondent to cease and desist from refusing to bargain with Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment
208 Workers Union (A. F. of L.) hereinafter referred to as the Union, "as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant * * *".

On April 27, 1944, the Company and the Union executed an agreement for a consent election. In accordance with the agreement the Company furnished the Regional Director of the Board, who was to conduct the election, with its pay roll list for April 21, 1944, the pay roll date contained in the agreement for the determination of eligible voters. Included in this list was the name of Jennie A. Kane with the notation that she was "Out Sick". There was evidence to the effect that this employee had last worked for the Company on March 24th and had not entered the plant from then until May 5, 1944, the date of the election, at which time she voted. Although the Company had observers present at the polls for the purpose of challenging questionable voters,

her vote was not challenged and her ballot was commingled with the others.

When the pay roll list was furnished, the Company officials had no knowledge that Mrs. Kane had severed her employment but believed that her absence from work was due to illness. The Company was still under that belief at the time of the election and for that reason did not challenge her vote. After the election a "Certification on Conduct of Election" was signed by representatives of the Company, the Union and the Board, certifying that the balloting had been held, that it was fairly conducted, and that all eligible voters were given an opportunity to cast their ballots secretly. The tabulation of the ballots disclosed that 231 votes were cast, 116 being cast for the Union and 114 against it, and one ballot had been challenged by the Union. The Board's Regional Director certified that a majority of ballots had been cast for the Union and that there were not challenges sufficient in number to affect the result of the election, so that it was
209 unnecessary to consider the validity of the ballot challenged by the Union. Hence on this appeal we must assume that the last-mentioned ballot was a valid vote and that it was cast against the Union. Thus, for our purposes, the total vote against the Union was 115, the total vote for the Union, 116, of which Mrs. Kane's vote is one. And so, if Mrs. Kane was not eligible to vote, the result might have been a tie. Although there is no reliable method of determining for whom Mrs. Kane voted, since her ballot was commingled with the other 230 ballots, we must assume that she voted for the Union. In fact, there was evidence to that effect.

Evidence before the Trial Examiner showed that the Company officials, within a few days after the election, learned that Mrs. Kane had applied for unemployment benefits and that the Company's files contained a notice from the Division of Employment Security for the Commonwealth of Massachusetts stating that Mrs. Kane had applied for unemployment benefits on April 28, 1944, and gave the date of the severance of her employment with the Company as March 1944. This was the first time the notice had come to the attention of a supervisory official of the Company. The Company on May 9th filed with the Regional Director an objection to his basing any determination of representatives upon Mrs. Kane's ballot since she was not an employee at the time she voted.

The Regional Director filed a report on these objections but did not make a finding as to whether Mrs. Kane was an employee at the time she voted and held that the Company could not challenge her vote after the election since the consent election agreement provided for the challenging of the eligibility of individual

voters only at the time of the balloting. The Regional Director then certified the Union as exclusive representative of all the employees. The Company thereafter refused to bargain with the Union on the ground that the Union had not been validly
210 chosen as the bargaining agent of a majority of the employees. The Board, upon a charge filed by the Union, issued a complaint alleging that the Company was engaging in unfair labor practices. A hearing was held before a Trial Examiner and his conclusion that the Company had lost its right to challenge the status of Mrs. Kane and was therefore guilty of an unfair labor practice under § 8 (1) and (5) of the Act was affirmed by the Board and the order which the Board here seeks to enforce was then issued.

The issues before us are: (1) whether the Board had jurisdiction to find the Company guilty of an unfair labor practice for refusing to bargain with the certified representative of the employees; and (2) whether the Company had waived its right to challenge the vote of Mrs. Kane.

The provisions of the consent election agreement with which we are here concerned are set forth below.[1] This agreement was approved by the Board's Regional Director.

---

[1] "Agreement for Consent Election

The undersigned Employer (herein called Employer) and the undersigned labor organization(s), subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director and the Board respectively), hereby agree as follows:

"1. Secret Ballot.—An election by secret ballot shall be conducted under the supervision of the Regional Director among the employees in the Unit defined below, at the indicated time and place, to determine whether or not the employees desire to be represented by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

• • • • • •

"3. Eligible Voters.—The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

• • • • • •

"6. Observers.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. • • •

"7. Objections, Challenges, Reports Thereon.—Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after the issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon."

211 The Company urges that it is not guilty of the unfair labor practice of refusing to bargain with the representative certified by the Board since the Union was not selected as the bargaining agent by a majority of the employees in the designated unit, and that neither waiver nor estoppel can enlarge an unfair labor practice as defined by the National Labor Relations Act.

The Company's contention that the Union does not represent a majority of the employees depends upon its assertion that
212 Mrs. Kane was not an employee on the date specified in the election agreement. There is no evidence before us on this issue and neither the Trial Examiner nor the Board made any finding as to whether she had the status of an employee when she voted. The Trial Examiner and the Board held that because the Company had not challenged Mrs. Kane's vote at the time of the election it was estopped from contesting the validity of her ballot at any time thereafter. Although the parties are not in accord as to whether the consent election agreement permitted a challenge of an employee's ballot after the election, we do not find it necessary to consider that problem because of the view we take of the case.

Section 8 (5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with the representative of his employees chosen by a majority of those employees. We do not believe that the Board has jurisdiction to find an employer guilty of such violation unless the Union with which he refuses to deal was chosen by a majority of the employees voting in the election. The Act does not give the Board or the Court power to compel an employer to deal with a union which was not selected by a majority of his employees. No theory of waiver or estoppel can be applied against an employer to confer jurisdiction upon the Board where the union with which the employer refuses to deal has not been chosen by a majority of the employees in the appropriate unit. Mooresville Cotton Mills v. N. L. R. B., 94 F. (2d) 61, 65 (C. C. A. 4th, 1938).

Sound considerations of public policy, in addition to the express language of the statute, compel this conclusion. Congress did not intend to sacrifice all the rights of the employees voting against the union. It preserved the right of these employees to make effective their disinclination to appoint a collective bargaining agent where their number constitutes one-half or more of
213 the total employees participating in the election. We do not feel that Congress intended to force a bargaining representative upon 115 employees who vote against such a representative when only 115 employees vote for it. Hence we conclude that the Board had no jurisdiction to find the Company guilty of violating § 8 (5) in the absence of a finding that Mrs. Kane was

an employee on the date stipulated. It is the duty of the Board to make a finding as to whether she was or was not an employee on April 21, 1944. If Mrs. Kane was an employee as of the date of the payroll list used to determine the eligibility of employees to vote in this election, then the Board will have jurisdiction to find the employer guilty of an unfair labor practice.

The Board urges that this case falls within the principles laid down in N. L. R. B. v. Capitol Greyhound Lines, 140 F. (2) 754 (C. C. A. 6th, 1944) cert. den. 322 U. S. 763. In that case an election was held under a consent election agreement, which provided, as in the instant case, that the determination of the Regional Director on all questions including eligibility of voters was to be final and binding. Several days after the election, the employer filed objections to the election, contending inter alia, that one Nolan was not entitled to vote as he was not an employee on the eligibility date designated by the agreement. The employer used the payroll list of August 15, in the belief that it was the same as that of July 31, the designated date. In fact, Nolan was hired after July 31, but before August 15, so that his name appeared on the August list but not on the July list. Nolan voted in the election and the employer did not challenge his vote at the polls. The Circuit Court sustained the Board's decision upholding the election. Although at first glance the factual situation in the Capitol Greyhound case would seem very close to the situation under consideration in the case at bar, a thorough study of
214 that case shows that there was no dispute as to the fact of Nolan's status as an employee. It was assumed that he became an employee after July 31st. The only dispute was as to the right of the employer to make a post election challenge. There was no question of jurisdiction. Since Nolan was admittedly an employee on the date of the election, it cannot be said that the Board was without jurisdiction to certify the Union as the bargaining agent of the employees. The statute gives the Board discretion to use any reasonable method it deems wise to determine whether a Union represents a majority of employees. Had the employer contested the fact of Nolan's employment as of the election and had the Board made no finding on that issue, the result in the Capitol Greyhound case might well have been different. While the Board has broad discretion in determining which group of employees is to constitute the bargaining unit and what qualifies an employee to vote, the Board has no power to tally the vote of one not an employee in determining whether the unit has received a majority vote. Insofar as any language of the Capitol Greyhound case may be inconsistent with the decision in the instant case, we feel that that language is too broad to be justified by the terms of the Act.

We do not now intend to pass on the validity of the consent election agreement as a whole, which the Board frequently uses as a means of administrative convenience and which undoubtedly facilitates the speedy determination of bargaining representatives and avoids the necessity of many lengthy and costly formal procedures by the Board. It is sufficient for the present to hold that the Board cannot confer upon itself a jurisdiction, which it does not have under the statute creating it, either by its own rules and regulations or by its approval of consent election agreements.

215 The Board undoubtedly has broad discretion to determine the manner in which the bargaining representative is to be designated. Southern S. S. Co. v. N. L. R. B., 316 U. S. 31, 37 (1942); N. L. R. B. v. Waterman S. S. Co., 309 U. S. 206 (1940); N. L. R. B. v. Falk, 308 U. S. 453, 458. And the Board may utilize any reasonable method it deems wise, so long as the procedure and rules it employs result in the choice of a bargaining representative by a majority of the employees in the designated unit. But the Board has no power to treat an employer's refusal to bargain with employees' representative as an unfair labor practice where that representative has not been seleceted by a majority of his employees. Mooresville Cotton Mills v. N. L. R. B., supra.

It is clear that the Board does not have the power to certify a union with which the employer has expressly agreed to bargain if that union does not represent a majority of the employees. How then can the employer confer jurisdiction, indirectly, on the Board by his agreement to the terms of an election which permit the bargaining representative to be designated by less than a voting majority of the employees in the unit?

Although the Act may not require that the certified representative be selected by a majority of all the employees, including those not voting, in the designated unit, the Act does require that the bargaining agent be chosen by a majority of those employees who do vote. The analogies the Board makes to corporate and political elections are not applicable to the instant case, since the powers of the Board are derived solely from the statute. We can construe its powers only in light of the statute creating it.

Because of the view we take of this case we find it unnecessary to pass on the correctness of the Board's interpretation of
216 the consent election agreement to the effect that it did not permit challenging of individual voters after the balloting.

The petition for enforcement of the order is denied and the case is remanded to the National Labor Relations Board for further proceedings not inconsistent with this opinion.

On the same day, to wit, December 13, 1945, the following Decree was entered:

In United States Circuit Court of Appeals

Decree

December 13, 1945.

This cause came on to be heard November 7, 1945, upon the record upon petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 13, 1945, here ordered, adjudged and decreed as follows: The petition for enforcement of the order is denied and the case is remanded to the National Labor Relations Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court,

(S) ARTHUR I. CHARRON, *Clerk.*

* * * * *

217 [Clerk's certificate to foregoing transcript omitted in printing.]

218 Supreme Court of the United States

Order allowing certiorari

Filed May 6, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

219 In the Supreme Court of the United States

Stipulation as to printing record

Filed July 5, 1946

It is hereby stipulated and agreed by and between the parties hereto, in accordance with the provisions of Paragraph 8 of Rule 38 of this Court, that the following portions of the Transcript of the Record in the United States Circuit Court of Appeals for the First Circuit which was filed herein with the petition for writ of certiorari may be omitted from the record which is to be reprinted under the supervision of the Clerk of this Court:

1. Copy of order dated August 3, 1944, designating trial examiner.

2. Telegram dated August 9, 1944, granting request of counsel for respondent for extension of time within which to file briefs.

3. Order dated September 30, 1944, transferring case to the National Labor Relations Board.

4. Letter dated October 9, 1944, from counsel for respondent to Board requesting oral argument.

5. Telegram dated October 13, 1944, from counsel for respondent to Board requesting extension of time in which to file exceptions.

6. Telegram dated October 13, 1944, from Board to respondent granting an extension of time in which to file exceptions.

220 7. Notice of hearing before the National Labor Relations Board dated January 12, 1945.

8. Telegram dated January 18, 1945, from the attorney for the International Ladies' Garment Workers Union to the Board requesting change of the date designated for the hearing.

9. Notice of postponement of the date for the hearing.

10. Statement of appearance at the oral argument before the Board.

11. Affidavit dated March 23, 1945, as to the service of Board decision and order.

12. Notice of hearing dated July 24, 1944, being the first page of Board Exhibit No. 1 in Case No. 1–C–2416.

13. Affidavit dated July 26, 1944, as to service of complaint and notice of hearing, being the last page of Board Exhibit No. 1 in Case No. 1–C–2416.

Dated at Washington, D. C. this 3rd day of July 1946.

J. HOWARD MCGRATH,
Solicitor General of the United States.

Dated at Boston, Mass. this 28 day of June 1946.

JOHN T. NOONAN,
Counsel for A. J. Tower Company.

[Endorsement on cover:] File No. 50653. U. S. Circuit Court of Appeals, First Circuit. Term No. 60. National Labor Relations Board, Petitioner, vs. A. J. Tower Company. Petition for writ of certiorari and exhibit thereto. Filed March 13, 1946. Term No. 60 O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946